No. _____

In the
Supreme Court of the United States
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

Petitioners,

v.

A.O. SMITH CORPORATION AND
A.O. SMITH HARVESTORE PRODUCTS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles A. Bird
Counsel of Record
Bird and Jacobsen
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503

Mary R. Vasaly
Maslon Edelman Borman
& Brand
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200
Of Counsel

Malcolm McCune
Maddin, Miller, and McCune
300 James Robertson Parkway
Nashville, Tennessee 37201
(615) 254-8756
Counsel for Petitioner

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

QUESTIONS PRESENTED

1. When does a civil RICO claim accrue for statute of limitations purposes where the Respondent continues to commit predicate acts which cause Petitioners additional, continuous, or accumulating damages within four years of bringing suit?

2. Do affirmative continuing acts of fraud including continuous false advertisements coupled with active cover up of the fraud, act to equitably toll the statute of limitations in a civil RICO case whether or not Petitioners have exercised reasonable diligence to discover their claim?

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IN THE
SUPREME COURT OF THE UNITED STATES
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MARVIN KLEHR AND MARY KLEHR *(Petitioners)*

v.

A.O. SMITH CORPORATION AND
A.O. SMITH HARVESTORE PRODUCTS, INC.
(Respondents)

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Marvin Klehr and Mary Klehr respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A) is reported at 87 F.3d 231. The opinion of the district court (App.B) is reported at 875 F. Supp. 1342.

JURISDICTION

The Court of Appeals entered its judgment by denying the Petition for Rehearing on July 29, 1996 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1962(c) provides that "it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." "Racketeering activity" is defined in 18 U.S.C. §1961 to include "any act which is indictable under any of the following provisions of title 18, United States Code: ...section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)..." 18 U.S.C. §1964(c) provides that "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages be sustains and the cost of the suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

Petitioners, husband and wife, are dairy farmers, who sued the Respondents in August, 1993 in U.S. District Court in Minnesota, alleging, among other things, a violation of the RICO statutes. They alleged they had been defrauded in (a) the purchase and (b) the subsequent continuing use and repair of an animal feed storage silo. The predicate acts underlying the RICO claim were mail and wire fraud. 18 U.S.C. §§1341, 1343. Jurisdiction of the Federal District Court was invoked under 18 U.S.C. §1964 (c) and 28 U.S.C. §1331 (general federal question jurisdiction). The district court dismissed the case on summary judgment based upon violation the statute of limitations. The Court of Appeals affirmed.

A. Defendants Affirmative Concealment of the Fraud and Affirmative Continuing Fraudulent Representations Caused Damage and Prevented Petitioners from Discovering the Fraud.

This case presents two distinct issues: (a) whether the appropriate rule of accrual of the statute of limitations for continuing RICO predicate acts occurring within 4 (four) years of the commencement of the lawsuit and (b) whether Respondents affirmative acts of concealment and continued fraudulent misrepresentations of the product to the Petitioners after the sale, equitably tolls the statute of limitations notwithstanding that Plaintiffs may have failed to exercise due diligence in discovering the fraud.

The Petitioners purchased a Harvestore brand silo from MVBA, a local dealer for A.O. Smith Harvestore Products, Inc. (hereafter "AOSHPI") in 1974. AOSHPI is a wholly owned subsidiary of A.O. Smith Corporation (hereafter "AOS") which

holds many of the patents for the Harvestore silo and did the vast majority of the secret internal research through which it knew that the product was defective in design

These design defects caused rapid deterioration of stored feeds. The design defects caused injury to the Petitioners' livestock, loss of milk production, and continuing needless "repairs" to the silo and associated equipment.

AOSHPI, through its local dealer and in other advertising venues, made numerous fraudulent claims through the use of the U.S. Mail and interstate wires concerning the ability of the silo to properly store and preserve feed. The fraudulent statements are set forth in the Amended Complaint (App. G-1 to G-29) and include claims that the silo would "prevent oxygen from contacting the feed", that the dealer (in this case MVBA) had access to all the research regarding the product, that good Harvestore feed smelled like "molasses", and that AOS engineers had solved the problem of structure breathing. These representations came to the Petitioners in the form of oral representations and a broadly based marketing campaign which included brochures, movies, the "Harvestore Farmer" magazine (published by AOSHPI) and advertisements in numerous national farm journals. Ibid.

The Respondents knew that the representations concerning the silo were false.[1] AOS had conducted

1 The product defects and fraudulent statements are documented in the Amended Complaint. App. G-30 to G-35. Juries and courts have found the representations regarding the Harvestore structures to be false and courts have roundly criticized AOSHPI for its fraudulent actions and disregard for the truth. Included among those: Kronebusch v. MVBA Harvestore System, 488 N.W.2d 490 (Minn. Ct. App. 1992) (review denied); Agristor Leasing v. Saylor, 803 F.2d 1401, 1403, 1408 (6th Cir. 1986) (retrial ordered to consider statute of limitations); Agristor Leasing v. A.O. Smith Harvestore Products, Inc., 869 F.2d 264, 265-266 (6th Cir. 1989); First National Bank of Louisville v. Brooks Farms, 821 S.W.2d 925, 927 (Tenn. 1991); Estate of Korf v. A.O. Smith Harvestore Products, Inc., 917 F.2d 480, 482 (10th Cir. 1990); Lollar v. A.O. Smith Harvestore Products, Inc., 795 S.W.2d 441, 442 (Mo. App. 1990) (app. to transfer

voluminous research on the Harvestore silo which contradicted the advertising claims. This research, at the direction of AOS, was all marked "secret and confidential." The general counsel for AOS had directed in 1968 that known defects in Harvestore silos should be protected from discovery in lawsuits by making sure that scientific studies be addressed to the AOS legal department, with copies to the true intended recipient, so that the company could falsely claim attorney/client privilege. App. E. This scheme was specifically intended to prevent discovery in civil suits concerning the known design defects in the Harvestore silo. None of this contradictory and extremely damaging internal research was ever communicated to MVBA (or any other dealers) nor to the farm customers. This was contrary to what had been represented in the advertising. See, e.g. G-29 and G-30 (Birth of a Harvestore film). Nor was this research ever published to the academic community, who were doing empirical research that ostensibly supported the false advertising claims. The Respondents then used the academic research in their advertising, but kept the contradictory and accurate internal studies secret.

The Plaintiffs purchased the silo in 1974 based upon numerous fraudulent representations regarding the ability of the silo to properly preserve stored feed. App. G-1 to G-14.

In spite of Respondents knowledge of the design defects in the silos, they not only sold the silos initially but also "continued to sell" the product and repairs for the product after it was purchased by the farm customer. This "continue to sell" campaign was a broad based marketing approach which included a continuous, free and unsolicited subscription to a "Harvestore" magazine. Each issue of this magazine included stories depicting extremely successful farmers from all over the country who attributed their success to their Harvestore silos. These magazines also included "Question and Answer" columns

denied).

in which proper management of the silo was represented to be the key to successful use of the silo. AOSHPI also falsely advertised in numerous other farm journals and publications, and provided false information to its dealers and directly to farmers. Through the dealers, AOSHPI orchestrated other "after sale" techniques such as farmer meetings, dealers training sessions, movies, and presentations at fairs and farm shows. This media barrage was specifically intended to "keep them sold."

At the same time that this after sale campaign was convincing the Petitioners to look elsewhere on their farm for the source of their injury, the Respondents were continuing to engage in product research which established the falsity of the marketing campaign. This scientific research was actively concealed, and marked secret and confidential. Instead of publishing their own damning research as promised in the advertising, the Respondents published favorable empirical research from university professors who were also kept in the dark about the infirmities of the silo.

The Petitioners in this case were continually duped by AOSHPI's post-sale predicate acts into believing their Harvestore was the "cadillac" of silos. The continuous barrage of after sale merchandising had its intended effect. App. G-14 to G-30. Petitioners were lulled into continuing to use the silo and spend more money on "repairs" to the Harvestore silo. In the case of the Petitioners, the last two predicate acts which caused damage took place in the fall of 1989, within 4 years of initiating suit in August, 1993. App. G-22, G-25; App. F. The Petitioners continued to use the silo until 1991. The post-sale ads not only reiterated the pre-sale claims but made new and different claims. They testified that the post-sale fraud caused them to overlook their silo as a source of any injury on their farm. Because the silos are supposedly "sealed" to prevent losses to the feed, the Petitioners were told not to open any doors or hatches. A sign on the side of the silo warned the

Petitioners not to go inside because there is "not enough oxygen to support life." It is practically impossible for the farmer to visually inspect the bottom of the silo, where all the damage occurs to the feed. The mold created in the bottom of the silo is caused to "disappear" by the churning action of the unloader, so the Petitioners didn't see mold in the feed that was fed to the livestock.

By continuing to use the silo, the Petitioners continued to incur injury for damaged livestock, and loss of milk production. The repairs to the silo continued until 1990, less than three years before suit was filed in August, 1993. The Petitioners discovered the causal connection between the Harvestore silo and their damages in March, 1991, when a university professor they had consulted removed an access panel on the silo and chopped through 2-3 feet of compacted feed in the bottom of the silo. By using a video camera with spotlight attached to a long pole, the professor discovered great quantities of mold in a void space immediately above the unloader. The professor demonstrated to Petitioner Marvin Klehr how none of this mold could be seen by the naked eye when it came out of the silo.

B. Proceedings Below.

The district court ruled that, because Petitioners were aware of the falsity of certain "non-actionable" representations,[2] they were put on notice of possible fraud and therefore concluded that the Petitioners had not used reasonable diligence

2 "Non-actionable" because they constituted statements of opinion or related to future performance of the silo, which courts have traditionally held do not support claims of fraud. Restatement (Second) of Torts §§539,542. These included representations that the Petitioners would have better animal health, reduced protein supplements, increased milk production and make more money. Petitioners Amended Complaint was not based upon the non-actionable representations. See App. G.

to investigate the fraud. Because more than six years (the state statute of limitations) had elapsed from the time the Petitioners should have discovered the actionable fraud, their state law fraud claims were held to be barred by the statute of limitations. The Court went on to hold that the RICO statute incorporated a similar due diligence requirement and therefore dismissed these claims as well.

The district court said that the Petitioners did not exercise reasonable diligence to discover the fraud, and, even though they did not *know* of the fraud, fraudulent concealment would not work to toll the statute because they *should have known*. App. B-13. The district court ignored and did not discuss AOS attorney's scheme to address scientific studies concerning the Harvestore silos to the legal department to falsely obtain an attorney/client privilege in civil discovery proceedings. Supra, at p. 5; and App. E. Nor did the district court discuss the scheme of the Respondents to cover up its internal research program which continued to demonstrate the falsity of the advertising claims. The district court held that the post-sale advertisements did not support equitable tolling (under state law principles) as a matter of law.

The district court dismissed Petitioners' RICO claims holding that Petitioners' failure of due diligence caused the statute to run, stating that "the same facts which should have alerted them to the fraud also should have alerted them that the alleged misrepresentations and injuries were part of a pattern." The district court rejected Petitioners' claims based upon the post-sale advertisements, concluding that the Petitioners suffered no new "independent injury" but rather just a "continuation of damages" that they had suffered since 1975. The district court ignored and did not address Petitioners' claims that their injuries in later years were proximately caused by the advertisements published and relied upon by the Petitioners within the statute of limitations.

The circuit court affirmed the district court, using nearly identical reasoning. The Petitioners were required by the circuit court to affirmatively investigate facts that "***might*** constitute a ***possible*** cause of action for fraud." App. A-11. (Emphasis added.) The circuit court did not address Petitioners' argument that there was continuing unlawful conduct by the Respondents within 4 years of bringing suit, which conduct was a proximate cause of Petitioners' continuing new damages. Petitioners had alleged in the Complaint that they reasonably relied upon fraudulent post-sale advertising published less than 4 years before filing the Amended Complaint which was a substantial contributing cause of damages within the statute of limitations. Petitioners' argument was misconstrued by the court as being a claim that any later *injury* automatically extended the statute of limitations on the original claim[3]. Petitioners' true argument was that later predicate *acts* that *caused damage* would work to create a *new claim*. This is the separate accrual rule accepted by a majority of the circuit courts. Bingham v. Zolt, 66 F.3d 553, 559 (2d Cir. 1995) (discussing conflict in the circuits and the separate accrual rule as adopted in the second circuit). Having recast Petitioners' argument, the court of appeals rejected it on the basis of its rejection of the "last predicate act" rule, citing Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991).

The circuit court gave no consideration to the AOS scheme to cover up and prevent discovery of damaging internal research which directly contradicted the advertising claims. App. E. The circuit court accepted the reasoning of the district court that new predicate acts in the form of post-sale advertising does not constitute concealment. The Petitioners' failure of due diligence was held to completely preclude application of the federal equitable estoppel doctrine. App. A-17 at f.n. 11.

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3 This is the "last predicate act or injury" rule of the 3d circuit espoused in Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988).

REASONS FOR GRANTING THE PETITION

This case involves two important issues: (1) accrual of the statute of limitations where there is continuing criminal conduct within the statute of limitations and (2) equitable tolling of the statute of limitations in civil RICO cases, where the Defendants have combined to actively conceal and cover up the fraud and also continue to falsely promote and advertise the product. In each of these areas, the decisions of the circuit courts are in conflict. This case presents an opportunity for the Court to clarify both of these muddied areas of the law.

Two seminal cases of this Court are the starting point of discussion. In Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed.2d 121 (1987), this Court held that the similarities in purpose and structure between RICO and the Clayton Act counseled in favor of borrowing the Clayton Act's four year limitations period for civil RICO claims. The court stated, however, that it had "no occasion to decide the appropriate time of accrual for a RICO claim." Id., 486 U.S. at 156-157. This case directly addresses the unresolved issue of the correct rule of accrual of the statute of limitations in civil RICO cases where there is continuing criminal conduct causing damage.

In Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L. Ed. 743 (1946), this court decided that the doctrine of equitable tolling is read into every federal statute of limitation. The unresolved question squarely presented here is whether equitable tolling applies where Respondents have combined to actively conceal and cover up the underlying fraud, and have continued to affirmatively falsely promote and advertise the product to the customer, even though Petitioners

may not have acted with due diligence.[4]

A. Accrual of the Statute of Limitations in RICO Cases for Continuing Unlawful Conduct That is a Cause of Damage.

1. The accrual rules adopted by the circuit courts are in conflict.

In the absence of guidance from the Supreme Court, the lower courts have adopted a variety of RICO accrual doctrines. An "injury discovery" accrual rule was adopted by the First, Second, Fourth, Fifth, Seventh, Ninth and D.C. Circuits. Rodriguez v. Banco Cent., 917 F.2d 664, 665 (1st Cir. 1990); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988) cert. den.; Pocahantas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211, 220 (4th Cir. 1987); LaPorte Const. Co. Inc. v. Bayshore Nat. Bank, 805 F.2d 1254, 1256 (5th Cir. 1986); McCool v. Strata Oil Co., 972 F.2d 1452, 1464-65 (7th Cir. 1992); Grimmett v. Brown, 75 F.3d 506, 510-11 (9th Cir. 1995); Riddell v. Riddell Washington Corp, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989). The Third, Sixth, Eighth, Tenth and Eleventh Circuits have adopted an "injury plus pattern discovery" accrual rule, with the Third Circuit's approach being broader and involving a "last predicate act or injury" approach. Keystone Ins. Co. v. Houghton, 863 F.2d at 1130-31 (3d Cir. 1988); Caproni v. Prudential Securities, Inc., 15 F.3d 614, 619-620 (6th Cir. 1994); Granite Falls Bank v. Henrikson, 924 F.2d

4 It is not disputed that the Petitioners did not know of the fraud. Whether Petitioners should have known of the fraud was hotly contested in the lower courts. The Petitioners presented evidence that they hired appropriate experts to help them with their investigation of the cause of problems on their farm, including veterinarians and nutritionists, and were not able to discover the fraud over the 16 years the Harvestore silo was in use. This investigation included contacts with the local dealer, who lied to them about the reason for the occasional presence of mold in the feed.

150, 154 (8th Cir. 1991); Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 820-821(10th Cir. 1990); Bivens Gardens Office Bldg v. Barnett Bank, 906 F.2d 1546, 1553-54 (11th Cir. 1990). The latter rule has been criticized by other circuits. Compare Keystone Ins. Co. v. Houghton, with Granite Falls Bank v. Henrikson. In addition, some courts in both groups utilize a "separate accrual" rule, under which new predicate acts or injury can extend the statute of limitations. To date, some form of "separate accrual" rule has been adopted in the First, Second, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits. See e.g. Rodriguez, 917 F.2d at 666; Bankers Trust Co., 859 F.2d at 1102; McCool, 972 F.2d at 1464-66; Granite Falls Bank 924 F.2d at 154; Bath, 913 F.2d at 820; Grimmett 75 F.3d at 510-11; Bivens, 906 F.2d at 1554-55. Predictably, the courts that have adopted the separate accrual rule do not agree in its application, bringing about unfair and inconsistent results. Some courts require "new and independent injury", but only when there are no new predicate acts. Some courts (such as the circuit court here) require new and independent injury even where there are new predicate acts. The courts also differ on what constitutes "new and independent" injury.

Petitioners urge this court to adopt the "last predicate act" rule of Keystone. If this Court rejects Keystone and instead adopts a "separate accrual" rule (where each new predicate act causing injury gives rise to a new claim, but doesn't revive old claims), then Petitioners urge this Court to reject the corollary enunciated by the Eighth Circuit in this case that each new predicate act must also be accompanied by independent injury to avoid the bar of the statute of limitations.

a. The Court should delay action on this Petition until Grimmett v. Brown is decided.

Recently, this court accepted certiorari in a case from the

Ninth Circuit to address the obvious conflict in RICO accrual law. See Grimmett v. Brown, 75 F.3d 506 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3830 (June 18, 1996). The ruling of this Court in Grimmett v. Brown will likely affect the outcome in this case. The circuit court in Grimmett discussed the separate accrual rule and equitable tolling. The amici in Grimmett have urged adoption of the Keystone approach to accrual. Petitioners here urge the Court to clarify accrual law in Grimmett by adopting the Keystone rule, as it best represents the remedial purpose of the statute. See separate briefs on appeal of National Association of Securities and Commercial Law Attorneys (NASCAT) in Support of Petitioners and Plaintiffs Executive Committee, MDL No. 1069, and David L. Forbes Supporting Reversal.

Because there is significant likelihood that this Court's decision in Grimmett will impact this case, Petitioners request that the court hold this case in abeyance until Grimmett is decided. See, Stern, et al, Supreme Court Practice (7th Ed, 1993) p. 358, citing United States v. American Broadcasting-Paramount Theaters, Inc. 383 U.S. 906 (1966) (ruling on certiorari delayed, and later denied). If this Court adopts the last predicate act rule of the Third Circuit, or clarifies the necessity of a "new and independent injury" under the separate accrual rule, the result in this case will be affected. The Court can then either remand to the Eighth Circuit for further proceedings consistent with this Court's decision in Grimmett or rule on this Petition.

b. The Court should grant certiorari in this case.

If this court does not provide a comprehensive rule concerning accrual in Grimmett, then certiorari should be accepted in this case to consider the best rule of accrual for new

predicate acts occurring within the statute of limitations. As noted above, conflict remains between the circuits as to whether a separate accrual rule should be based upon the "last predicate act" and whether new overt acts revive claims for past predicate acts.

Many of the federal circuits have adopted the separate accrual rule for RICO claims under which a new claim accrues for continuing violations of the law, triggering a new four year limitations period, each time the Plaintiff discovers, or should have discovered, the operative event triggering accrual (that is, either injury or injury plus a pattern of racketeering activity). Supra, discussion at p. 12. This rule has various mutations, requiring guidance from this Court. See McCool v. Strata Oil Co., 972 F.2d 1452, 1464-66 (7th Cir. 1992) (discussing differing accrual rules, and stating "each wrongful act that causes injury is a new cause of action..."); Bath v. Bushkin, Gaims, Gaines, & Jonas, 913 F.2d 811, 820 (10th Cir. 1990) (discussing separate accrual rule where knowledge of pattern required); Humes, RICO and a Uniform Rule of Accrual, 99 Yale L.J. 1399, 1412, n. 85 (1990) (criticizing the separate accrual rule); Hackenberg, Accrual of Civil RICO Claims, 48 La.L. Rev. 1411, 1414 (1988).

The Second, Third, Ninth (in Grimmett) and now the Eighth Circuit in this case have adopted a "new and independent" injury precondition for separate accrual of RICO claims. Bingham v. Zolt, 66 F.3d 553, 559 (2d Cir. 1995); Glessner v. Kenny, 952 F.2d 702, 707-708 (3d Cir. 1991) (requiring a new and independent injury only when there are no new predicate acts within 4 years of bringing suit). The Eighth Circuit rule as applied to a case involving continuing and accumulating injury would permit a RICO defendant, such as the Respondents here, to perpetrate a fraud and, once the limitations period runs on the original fraud, to continue to perpetrate fraudulent acts and cause further injury, which

conduct is then protected from suit by the statute of limitations as long as the injuries flowing from the new acts of fraud are not "independent," i.e. qualitatively different from the previous injuries. In the present case, this means that the Petitioners, who were originally defrauded in 1974 in the sale of the silo, cannot sue the Respondents for the new fraudulent acts which occurred in the fall of 1989 and which caused further injury at that time, because the statute of limitations has run on the 1974 fraud. In other words, Petitioners' statute of limitations for the 1989 predicate acts and any continuing injuries ran out before those acts and injuries even took place. This is a radical departure from the intent of the RICO statute, which is to prevent continuing pattern criminal conduct. This rule effectively insulates and encourages such unlawful conduct, an anomalous and indefensible result.

The question is whether the 1989 predicate acts were a *substantial contributing cause* of the injuries occurring thereafter, but not necessarily the *sole cause*. Restatement (Second) of Torts §546 (discussing causation in the context of fraud) and comment b ("It is not, however, necessary that his reliance upon the truth of the fraudulent representation be the sole or even the predominant or decisive factor in influencing his conduct. It is not even necessary that he would not have acted or refrained from acting as he did unless he had relied on the misrepresentation. It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.") Both the pre-sale and post-sale ads were *a cause* of injury to the Petitioners in later periods. Therefore, attempting to identify either a single source of injury or requiring that the injuries be different in kind or quality only clouds the question. The simple issue is whether the later predicate acts were a contributing cause of some injury. If so, a new claim is created which has its own statute of limitations.

2. The decision of the Eighth Circuit is erroneous.

The separate accrual rule, as first contemplated by then Judge Kennedy in his concurrence in State Farm Mut. Auto. Ins. Co. v. Ammann, 828 F.2d 4 (9th Cir. 1987) provided as follows:

> The rule is that a cause of action accrues when *new overt acts occur* within the limitations period, even if a conspiracy was formed and other acts were committed outside of the limitations period. A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside of the limitations period. (Italics added).

The "new and independent" injury requirement of separate accrual for RICO claims began as a reaction to the breadth of the Third Circuit's "last predicate act or injury" rule in Keystone Ins. Co. v. Houghton, supra. In Keystone, the court held that either a new act or a new injury occurring within the limitations period rendered timely an otherwise time-barred RICO claim. In that case, as in this one, there was an additional predicate act and injury within the four year period. The Keystone rule states:

> The limitations period for a civil RICO claim runs from the date the Plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the Plaintiff or further predicate acts occur, in which case the accrual period shall run from the time the Plaintiff knew or should have known of the last injury or the last

> predicate act which is part of the same pattern of racketeering activity. 863 F.2d at 1130.

In Glessner v. Kenny, 952 F.2d 702 (3d Cir. 1991), there was additional injury within the limitations period, but no new predicate act. In that case, the court first established the "new and independent" injury requirement, purportedly relying on decisions from the Second and Eleventh Circuits. Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), cert. den. 490 U.S. 1007 (1989); Bivens Garden Office Bldg v. Barnett, 906 F.2d 1546, 1555 (11th Cir. 1990). While neither Bankers Trust nor Bivens Gardens stand for a requirement of *qualitatively* different damages, both the Eighth Circuit (in this case, where there were new predicate acts[5] and more injury within four years) and the Ninth Circuit (in Grimmett) now require such evidence to avoid the bar of the statute of limitations. The Eighth Circuit rule adopted in this case goes much further than the rule in Glessner, because it requires the Petitioner to show new and independent injury even when there are new predicate acts within the statute of limitations.

This new rule creates in the tortfeasor/criminal a license to continually injure RICO victims once the original statute of limitations is past. Since the whole purpose of RICO is to eliminate *pattern* criminal conduct, the intent of the law will be perverted and largely nullified by placing the Courts in the dubious position of protecting RICO violators who are rendered immune from suit after the passage of the four year limitations period. Because the continuing *pattern* conduct is likely to be

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5 In this case, there were new advertisements relied upon by the Plaintiffs in the fall, 1989 Harvestore Farmer magazine and an October 25, 1989 ad in Hoards Dairyman, a national farm publication. App. F. Plaintiffs alleged injury flowing from these fraudulent advertisements. As noted above, this does not mean that there were not other causes of the same injury, including the fraud perpetrated before the sale. See discussion, supra at 15.

the same, the *injuries* resulting from the conduct are often the same.

To use the example cited in the Supreme Court's opinion in H.J., Inc. v. Northwestern Bell Tel., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), if a RICO violator collected protection payments from merchants for more than four years, the RICO violator would have a complete limitations defense for his acts, even though payments were extracted within the four year period prior to suit. By requiring a RICO plaintiff to establish an "independent injury" i.e., that the original fraud played no part in the later injury or that the later injury was qualitatively different from the first injury, courts effectively authorize RICO violators to continue their past predicate acts and resulting damages into the future without the risk of incurring RICO liability. This makes no sense, especially when one considers that the majority of courts have ruled that a civil RICO plaintiff cannot seek injunctive relief under RICO. See, e.g., Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986). Like any other civil plaintiff, a RICO plaintiff may decline to bring suit against a defendant for a long time for prudent reasons, including the risk and cost of litigation, the attendant publicity or notoriety, and the likely response of a defendant. There is little to recommend the contention that a plaintiff who delays bringing a RICO claim until after the expiration of the four year limitations period is barred forever from instituting suit based upon injuries inflicted thereafter by criminal acts of the defendant simply because they are the same type as previously suffered, or because the original predicate act was a part of the cause of those injuries.

Petitioner's argument is in accord with the liberal construction policy espoused by the drafters of RICO. RICO states that "the provisions of this title shall be liberally construed to effectuate its remedial purpose." Racketeer Influenced and Corrupt Organization Act, Ch 96, §904(a), 84 Stat. 947 (1970),

note following 18 U.S.C. §1961. "The statute's remedial purposes are nowhere more evident than in the provision of a private action for those injured by racketeering activity," Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). The language of the statute, as well as "Congress' self consciously expansive language and overall approach," mandate that RICO be read broadly. The Eighth Circuits' requirement of an independent injury is directly opposed to the remedial purposes of the statute.

B. Continuous False Advertising and Active Concealment of Fraud Should Equitably Toll the Statute of Limitations in a Civil RICO Case.

1. The circuit court's application of the federal equitable tolling doctrine conflicts with the rule in the Second and Seventh Circuits.

Petitioners specifically plead fraudulent concealment coupled with continuing active fraud in the Amended Complaint. App. G-14 to G-35. The issue raised here is whether the Petitioners need to prove due diligence in discovering the fraud underlying the predicate acts where the Respondents have engaged in active concealment of the fraud while, at the same time, continuing to fraudulently promote the use and repair of the product to the consumer. The circuit court in this case did not address the claim of fraudulent concealment as a basis for federal equitable tolling except to conclude that, "the Klehr's failure to act with due diligence precludes the application of this doctrine." App. A-17, f.n. 11.

A conflict exists between the rule applied by the circuit court in this case and the rule applied in the Second and Seventh Circuits. Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979); Sperry v. Barggren, 523 F.2d 708, 711 (7th Cir.

1975). In these circuits, the plaintiff must prove due diligence only when the defendant is involved in "passive" concealment, i.e. where the defendant takes no further steps to disguise the fraud from the plaintiff. Clute v. Davenport, Co., 584 F. Supp 1562, 1578 n.4 (D. Conn. 1984). The D.C. Circuit has attempted to reconcile these differences. Hohri v. United States, 782 F.2d 227, 248, n. 54 (D. C. Cir. 1986); Riddell v. Riddell Washington Corp, 866 F.2d 1480, 1491 (D.C. Cir. 1989). According to these cases, if there is fraudulent concealment, the defendant has the burden of proving something closer to actual notice to set the statute running. The deceptive conduct "may be as simple as a single lie." Riddell v. Riddell Washington Corp., supra, 866 F.2d at 1491.

According to the Eighth Circuit, equitable tolling is never even a consideration where it can otherwise be determined there was a lack of due diligence. In other words, the Respondent's continuing fraud can be ignored if the Petitioners are negligent in discovering the original fraud. Moreover, the Eighth Circuit refused to even consider fraudulent concealment of the original fraud or continuous fraudulent advertisement of the product as relevant factors in determining whether Petitioners exercised due diligence. Under the Eighth Circuit's reasoning, the merest inquiry notice (that there "might be a possible fraud") triggers the statute, which cannot thereafter be stopped by a party's fraudulent concealment or other overt acts that effectively "lull" the plaintiff into taking no action. Not even the burden of proof is shifted. The facts in the record undeniably lead to a different result depending only on the plaintiff's selected forum. The Supreme Court should reconcile this difference in application of the equitable tolling doctrine.

If this Court rejects the Keystone rule in Grimmett, it will be particularly important for the Court to address equitable tolling in the RICO context. Plaintiffs in RICO cases will be faced with the loss of meritorious claims, and defendants will be

encouraged to cover up their fraud until the 4 year limitations period is past. The lower courts will be faced with numerous claims of tolling, and need the guidance of this Court regarding the correct rule to apply.

2. The decision of the Eighth Circuit is erroneous.

The Petitioners in this case were continually duped, over the many years they owned the silo, into believing it was the "cadillac" of silos. There was a continuous barrage of "after sale" merchandising which had its intended effect. At the same time that this after sale campaign was convincing the Petitioners to look elsewhere on their farm for the source of their injury, the Respondents were continuing to engage in product research which established the falsity of the marketing campaign. This scientific research was actively concealed, and marked secret and confidential. Instead of publishing their own damning research as promised in the advertising, the Respondents published favorable empirical research from university professors who were also kept in the dark about the infirmities of the silo.

There is a stark contrast between a tortfeasor who, on the one hand violates the law and thereafter stands mute, and another tortfeasor who, after committing the original fraud, perpetrates additional fraud while, at the same time, actively concealing the original fraud. Such persons should, in equity, be treated differently. The former may justifiably take advantage of the "due diligence" principle which requires the plaintiff to act or lose his claim. The latter, because of his continuing violation, should suffer a penalty regardless of whether his victim has acted with due diligence. The continuing tortfeasor should have the burden of proving that the plaintiff actually knew of the fraud. This is a reasonable price to pay for the continued

criminal conduct. The rule of the Seventh and Second Circuits is a better rule of law and should be adopted by the Supreme Court in civil RICO cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Charles A. Bird
Bird and Jacobsen
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503
Counsel of Record

Mary R. Vasaly
Maslon Edelman Borman & Brand
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200
Of Counsel

Malcolm McCune
Maddin, Miller, and McCune
300 James Robertson Parkway
Nashville, TN 37201
(615) 254-8756
Counsel for Petitioner

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-1355

Marvin Klehr and Mary Klehr;	*	
	*	
Plaintiffs-Appellants,	*	
	*	
William G. Olson,	*	
	*	
Intervenor,	*	Appeal from the United
	*	States District Court for
v.	*	the District of
	*	Minnesota.
A.O. Smith Corporation;	*	
A.O. Smith Harvestore Products,	*	
Inc., Jointly and Severally,	*	
	*	
Defendants-Appellees.	*	

MVBA Harvestore Systems,

Movant.

Submitted: October 18, 1995

Filed: June 6, 1996

Before FAGG, HEANEY, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Marvin Klehr and Mary Klehr (Klehrs) appeal from the district court's[1] entry of summary judgment against them on their various Minnesota state law and Racketeer Influenced and Corrupt Organizations Act ("RICO") claims. These claims are premised upon alleged misrepresentations made by defendant A.O. Smith Harvestore Products, Inc., a subsidiary of defendant A.O. Smith Corporation (collectively "AOSHPI"), and AOSHPI's authorized local dealer, MVBA Harvestore Systems, concerning a Harvestore silo that the Klehrs purchased. The district court ruled that the Klehrs' claims were barred by the statute of limitations. Klehr v. A.O. Smith Corp., 875 F. Supp. 1342 (D. Minn. 1995). We affirm.

I.

The Klehrs operate a dairy farm in Minnesota. In approximately 1974, they purchased a Harvestore silo manufactured and marketed by AOSHPI and sold by MVBA. Richard Deutsch, a salesman for MVBA, provided the Klehrs with information about Harvestore silos before and after the Klehrs purchased the Harvestore, and he also served as their local contact when they had problems with the unit.

The fulcrum for the Klehrs' claims relates to certain representations made by AOSHPI concerning a Harvestore silo's unique "oxygen limiting" feature. Marvin Klehr was an experienced dairy farmer and knew that mold and spoilage in

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[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

livestock feed are caused due to the feed's exposure to oxygen, and that moldy and spoiled feed would be harmful to his dairy herd if fed to it. According to the Klehrs, AOSHPI represented that because the Harvestore silos were sealed, feed stored in the unit would have almost no exposure to oxygen, thereby virtually eliminating problems with moldy or spoiled feed.[2] This would result in higher feed quality, which in turn would eliminate the need to add protein supplements to the herd's daily feed ration. It would also improve the health of the herd and increase milk production at a rate of three to five pounds of milk per cow per day. All of these purported benefits would ultimately increase the profitability of the Klehrs' dairy operation. Although a Harvestore silo was considerably more expensive than a conventional stave silo, which the Klehrs also considered purchasing, it was explained to the Klehrs that Harvestore's unique "oxygen limiting" feature justified the higher cost of the unit and that the unit would pay for itself in four to five years. The Klehrs recognized, however, that all of the promised virtues of a Harvestore unit hinged upon the efficacy of the structure's "oxygen-limiting" feature.

Despite AOSHPI's representations, the Klehrs experienced a myriad of problems after the Harvestore unit was installed. In July and August of 1976, Marvin Klehr observed white chunks of mold in the haylage[3] he removed from the unit. He contacted Deutsch, who assured him that the mold was normal and simply the product of a minute quantity of oxygen that entered the top hatch of the unit when

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[2] Some of AOSHPI's promotional materials apparently likened a Harvestore silo to a giant sealed fruit jar.

[3] "Haylage" in the context of this case refers to chopped alfalfa silage stored in a silo at a designated moisture content to promote fermentation.

it was being filled.[4] Deutsch explained that the Klehrs could expect a thin layer of mold each time the Harvestore was filled because of the small amount of oxygen that would flow into the unit during the filling process. The Klehrs accepted this explanation.

In the spring of 1977, Marvin Klehr again noticed chunks of mold in the feed and also observed that the feed had become unusually dark brown and smelled musty. Marvin Klehr loaded the spoiled feed into a manure spreader and dumped it on one of his fields. Marvin Klehr made the same observations in the spring of 1978 and undertook the same action. This process was repeated each spring, with the amount of moldy or spoiled feed always ranging from one to two manure spreader loads.[5]

The Klehrs' dairy herd also began suffering from various health problems after the Klehrs started feeding the herd haylage stored in the structure. Some of the health problems had not previously afflicted the herd, while other maladies began occurring with much greater frequency. These ailments included: displaced abomasums or "twisted stomachs," "foot problems," swelling and bruises around the

[4] A Harvestore silo is filled through an open hatch at the top of the structure and unloaded by way of a chain-type unloader at the bottom of the unit. During the unloading process, so-called "breather bags" at the top of the silo expand to prevent oxygen from entering.

[5] The only exception to this process was that in approximately the spring of 1982, Marvin Klehr noticed a much greater quantity of moldy and spoiled feed than he had previously observed. The feed was much darker brown and contained significantly more and larger chunks of mold. He immediately ceased feeding his dairy herd feed from the Harvestore unit and subsequently emptied approximately 12 manure spreader loads of spoiled feed from the unit. Deutsch and AOSHPI officials later made repairs to the unit. Thereafter, the process returned to what it had previously been -- one to two manure spreader loads of spoiled or moldy feed emptied from the unit each spring.

joints in the cows' hind legs, cows "going off feed," unusually thin and unthrifty cows, cows having rough hair coats and dull eyes, a higher rate of uterine infections, and more diarrhea and digestive problems than normal. Further, the Klehrs' herd began having certain breeding and reproductive problems, such as poor conception rates, longer calving intervals, and spontaneous abortions.

Additionally, the Klehrs never realized the numerous benefits AOSHPI represented the Harvestore unit would provide, namely, an increase in milk production, elimination of protein supplements, and ultimately, an increase in profitability of the dairy operation. In fact, although their dairy operation had been profitable prior to their purchase of the Harvestore, the Klehrs experienced financial hardship after they started using the Harvestore. Despite all of this, the Klehrs never questioned Deutsch about the inability to eliminate protein supplements or the lack of increase in milk production or profitability until 1990. The Klehrs did consult a number of nutritionists and veterinarians during the years after they purchased the Harvestore concerning several of the herd's health and reproductive problems, but they never asked these consultants whether the Harvestore could have been the source of the problems. Finally, the Klehrs did not examine records which they possessed which would have illustrated to them that their herd's milk production was below that of other local herds and that the herd's milk production and the profitability of the dairy operation had not increased since the Harvestore was installed.

In 1991, Marvin Klehr saw an article in a Minneapolis, Minnesota, newspaper regarding a claim concerning a Harvestore unit that had been made against AOSHPI in Minnesota state court. Marvin Klehr subsequently contacted a University of Minnesota veterinarian, Dr. William Olson, about a health problem with his herd; in April of 1991, Dr. Olson visited the Klehrs' farm. Dr. Olson and Marvin Klehr

subsequently looked inside the Harvestore and observed large amounts of moldy and spoiled feed. This was the first time that Marvin Klehr had looked inside the Harvestore unit when feed was still being stored in the unit.

The Klehrs later commenced this action on August 27, 1993, alleging Minnesota common law fraud and negligent representation claims, violations of certain Minnesota consumer statutes, and violations of RICO. AOSHPI moved for summary judgment on each claim arguing, inter alia, that the claims were barred by the statute of limitations. The district court granted AOSHPI's motions. Klehr, 875 F. Supp. at 1345. The Klehrs appeal.

II.

We review de novo the district court's grant of summary judgment. Maitland v. University of Minn., 43 F.3d 357, 360 (8th Cir. 1994). Summary judgment is appropriate if the record, when viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A.

We turn our attention first to the Klehrs' Minnesota common law fraud claims, which are governed by a six-year statute of limitations. See Minn. Stat. Ann. § 541.05(6) (West 1988).[6] Under this statute, the cause of action accrues, thereby triggering the limitations period, upon "the discovery by the aggrieved party of the facts constituting the fraud." Id.

[6] With respect to these claims, we review de novo the district court's interpretation of Minnesota law. Michalski v. Bank of America Arizona, 66 F.3d 993, 995 (8th Cir. 1995).

The Minnesota Supreme Court has construed this statute as imposing a standard of objective reasonableness upon a plaintiff to discover the facts constituting the fraud. Bustad v. Bustad, 116 N.W.2d 552, 555 (Minn. 1962). "[T]he facts constituting the fraud are deemed to have been discovered when, with reasonable diligence, they could and ought to have been discovered." Blegen v. Monarch Life Ins. Co., 365 N.W.2d 356, 357 (Minn. Ct. App. 1985) (quotations omitted). "A plaintiff must exercise reasonable diligence when he or she has notice of a possible cause of action for fraud." Buller v. A.O. Smith Harvestore Prods., Inc., 518 N.W.2d 537, 542 (Minn. 1994). A "'party need not know the details of the evidence establishing a cause of action, only that the cause of action exists'" in order for the limitations period to commence. Id. (quoting Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 919 (Minn. 1990)). A failure to actually discover the fraud will not toll the limitations period if such a failure is inconsistent with this reasonable diligence standard. Blegen, 365 N.W.2d at 357.

The Klehrs bear the burden of showing that they did not, and that with reasonable diligence they could not, discover the facts constituting the fraud earlier than August 27, 1987, six years prior to the time this action was filed. Id. A plaintiff's due diligence in the statute of limitations context is ordinarily a question of fact. Hines v. A.O. Smith Harvestore Prods. Inc., 880 F.2d 995, 999 (8th Cir. 1989). Where the evidence leaves no room for reasonable minds to differ on the issue, however, the court may properly resolve the issue as a matter of law. Miles v. A.O. Smith Harvestore Prods., Inc., 992 F.2d 813, 817 (8th Cir. 1993).

The Klehrs argue that they did not become aware of the facts constituting the fraud until April of 1991, when Marvin Klehr, accompanied by Dr. Olson, looked inside the silo for the first time during feed storage and observed large amounts of mold in the feed. The Klehrs submit that they questioned

Deutsch about the presence of mold and spoilage in the feed and that at various times they consulted numerous veterinarians and nutritionists concerning the health and reproductive problems that their dairy herd was experiencing. Based on these actions, the Klehrs assert that a fact question exists concerning whether they exercised reasonable diligence to determine the facts constituting the fraud. We disagree.

Shortly after they began using the Harvestore unit to store haylage, the Klehrs encountered problems that were directly contrary to AOSHPI's representations concerning the benefits a Harvestore unit would provide. AOSHPI represented to the Klehrs that using a Harvestore to store feed for their dairy herd would virtually eliminate problems with moldy and spoiled feed. However, beginning in July of 1976 and continuing each subsequent year, Marvin Klehr observed mold in the feed which had been extracted from the unit; further, beginning in the spring of 1978, Marvin Klehr annually emptied one to two manure spreader loads of moldy or spoiled feed from the unit. Further, contrary to AOSHPI's representations of improved herd health, herd health actually deteriorated. The herd also began experiencing heretofore unencountered breeding and reproductive problems. The Klehrs consulted with a number of nutritionists and veterinarians over the years, but they never asked any of these consultants whether the feed fed from the Harvestore silo could have been the source of the herd's health and reproductive problems.

Similarly, it was represented to the Klehrs that one of the chief virtues of a Harvestore was that it would dramatically improve the quality of the feed such that protein supplements would become unnecessary; the Klehrs, however, were never able to reduce or eliminate protein supplements to the herd's daily feed ration. In addition promises of increased milk production and profitability of the dairy operation went unfulfilled; in fact, while the Klehrs' dairy operation had been

profitable prior to the purchase of the Harvestore, thereafter the Klehrs experienced financial hardship because the dairy profits were not large enough. The Klehrs failed to examine records in their possession which would have indicated to them that the Harvestore unit was not delivering the promised increases in milk production and profitability, and that the herd's milk production was subpar compared to other local dairy herds. The Klehrs did not question Deutsch or AOSHPI officials until 1990, some 16 years after putting the Harvestore to use, about the lack of an increase in milk production and profitability of the dairy operation, and the inability to eliminate protein supplements from the herd's daily feed ration.

The Klehrs assert that health or reproductive problems in a dairy farming operation can be caused by a myriad of factors inherent in dairy farming and therefore determining the precise source of the problem is impossible. Setting aside the other promised benefits concerning the Harvestore which never came to pass (moldy and spoiled feed, inability to eliminate protein supplements), in this case the Klehrs' herd suffered numerous health and reproductive problems shortly after the Klehrs started to feed the herd haylage stored in the Harvestore unit. After encountering these problems, the Klehrs were on notice of a possible cause of action for fraud and were required to conduct a reasonably diligent investigation -- perhaps by inspecting the silo during feed storage (which they did for the first time in 1991 and observed the prevalence of mold), by questioning Deutsch or AOSHPI representatives concerning why the dairy operation was not profitable, or by asking a veterinarian or nutritionist whether the Harvestore could be the source of the problems. Their failure to do so is simply inconsistent with Minnesota's inquiry notice standard, under which plaintiffs are required to exercise reasonable diligence to discover the facts which may constitute the fraud. We hold that, as a matter of law, the Klehrs, by

exercising reasonable diligence, should have discovered the facts constituting the alleged fraud prior to August 27, 1987.

This case is distinguishable from our holding in Hines, where we were called upon to decide whether the Missouri statute of limitations barred the plaintiffs' common law fraud claims in connection with several Harvestore silos. 880 F.2d at 995. We held in Hines that a factual dispute existed concerning when the plaintiffs' cause of action accrued under Missouri law because there was a conflict in the evidence concerning when the plaintiffs should have known that the Harvestore silos were not operating as AOSHPI represented. Id. at 998. Notwithstanding Hines, our analysis in this case, which concerns Minnesota state law claims, is governed by the teachings of the Minnesota Supreme Court concerning the interpretation and application of that state's discovery accrual rule; of particular import is that court's recent decision in Buller, which, like this case, involved the application of the statute of limitations involving a claim of fraud in connection with a Harvestore silo. Our analysis is also guided by the Minnesota federal district court's holding in Veldhuizen, wherein that court addressed the precise issues in front of us in another case involving a Harvestore silo. The analysis expounded in these cases makes clear that the Klehrs' cause of action accrued long before August 27, 1987. Thus, our Hines decision, in which we were called upon to interpret Missouri's discovery rule, is not controlling here.

In any event, to the extent that Hines applies, there we relied upon evidence that water had leaked into the Harvestore due to cracks in the structure and had possibly come into contact with the feed stored within; thus, the plaintiffs would have been unable to determine whether the silo, if it had been properly sealed, nevertheless could not live up to AOSHPI's representations that moldy and spoiled feed would be eliminated. The Klehrs, however, have made no similar showing that their silo had cracks that may have permitted

water to come into contact with the stored feed, and which would create a question of fact as to the cause of the moldy or spoiled feed.[7]

The Klehrs also contend that the statute of limitations did not commence until they were aware that the Harvestore unit had a design defect that prevented it from performing as represented. Such a standard, however, is wholly inconsistent with the Minnesota Supreme Court's teaching that the requirement of reasonable diligence imposes an affirmative duty to investigate upon a party who is aware of facts that might constitute a possible cause of action for fraud. Buller, 518 N.W.2d at 542; Hydra-Mac, 450 N.W.2d at 919 ("A party need not know the details of the evidence establishing the cause of action, only that the cause of action exists."). We find persuasive the following statement from Veldhuizen, where the court addressed this precise issue: "The limitations period does not wait to run until the [plaintiffs] were able to make a causal connection between the failure of the silo to perform as promised and a particular design defect." Veldhuizen v. A.O. Smith Corp., 839 F. Supp. 669, 676 (D. Minn. 1993). Thus, we reject the Klehrs' argument that the limitations period did not commence until they were able to pinpoint the design flaw that prevented the Harvestore from performing as represented.[8]

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[7] Both parties cite a number of cases from other jurisdictions dealing with the Harvestore litigation. See, e.g., Horn v. A.O. Smith Corp., 50 F.3d 1365 (7th Cir. 1995); Mohr v. A.O. Smith, et al., 1994 WL 178111 (E.D. Mich.); Nelson v. A.O. Smith Harvestore Prod., Inc., No. 86-4230-R (D. Kan. 1990); Johnston v. AgriStor Credit Corp., Civ. No. 84-4421-S (D. Kan. 1987). While we find the analysis of these courts to be somewhat helpful, again our analysis is governed by the Minnesota Supreme Court's interpretation of Minnesota's discovery accrual rule applicable to fraud claims.

[8] Likewise, we reject as meritless the Klehrs' assertion that their "failure to realize non-actionable predictions of future performance" did

B.

The Klehrs contend that AOSHPI fraudulently concealed their fraud cause of action and therefore the statute of limitations should be tolled. "Fraudulent concealment 'tolls the statute of limitations until the party discovers, or has a reasonable opportunity to discover, the concealed defect.'" Buller, 518 N.W.2d at 542 (quoting Hydra-Mac, Inc., 450 N.W.2d at 918). The limitations period is tolled, however, "only if it is the very existence of the facts which establish the cause of action which are fraudulently concealed." Hydra-Mac, Inc., 450 N.W.2d at 91819. "Merely establishing that a defendant had intentionally concealed the alleged defects is insufficient; the claimant must establish that it was actually unaware that the defect existed before a finding of fraudulent concealment can be sustained." Id. Further, "'there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action'" for fraudulent concealment to apply. Wild v. Rarig, 234 N.W.2d 775, 795 (Minn. 1975) (quoting 54 C.J.S. Limitations of Actions § 206f). The Klehrs bear the burden of showing that AOSHPI concealed the fraud and that the concealment itself could not have been discovered sooner by exercising reasonable diligence. Buller, 518 N.W. 2d at 542-43.

The Klehrs contend that material fact issues remain concerning whether AOSHPI knew that the Harvestore silos

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not trigger the statute of limitations. (Klehrs' brief at 21.) The problems the Klehrs actually experienced shortly after they started using the Harvestore should have put them on notice that AOSHPI's representations concerning the unit were false, regardless of whether other performance benefits would have been independently actionable. While the Klehrs may not have been required to immediately file suit when they realized the representations were not true, they were required to conduct a reasonable further investigation, which, as we have outlined in detail, they failed to do.

were defective and deliberately concealed the defects from them through oral representations, written materials sent to Harvestore owners, and promotional meetings which the Klehrs attended. The Klehrs also contend that suggestions made by Deutsch and representatives of AOSHPI concerning methods to improve the dairy operation served to conceal the defects from them. According to the Klehrs, these misrepresentations prevented them from discovering the fraud, and accordingly the statute of limitations should be tolled during the period these continuing misrepresentations were made.

These arguments are unpersuasive quite simply because the Klehrs have made no showing that AOSHPI affirmatively concealed from them the existence of facts which would have supported their cause of action for fraud. As chronicled in detail above, the Klehrs were aware as early as 1976, when Marvin Klehr saw mold in feed taken from the Harvestore, that the silo was not performing as promised. The oral and written representations the Klehrs rely on to support their fraudulent concealment argument did not, and indeed could not, prevent them from discovering that AOSHPI's promises concerning the virtues of a Harvestore unit did not come to pass. See Miles, 992 F.2d at 816 (rejecting claim of fraudulent concealment in connection with Harvestore because of impossibility for defendants to conceal facts giving rise to cause of action when the evidence was in the plaintiff's own yard); Veldhuizen, 839 F. Supp. at 675 ("providing the [plaintiffs] with the post-sale materials does not rise to the level of affirmative concealment necessary to toll the statute of limitations."). Id. See also Buller, 518 N.W. 2d at 543 (rejecting fraudulent concealment claim based on post-sale advertising materials because plaintiff knew that Harvestore was not performing as represented). In short, the Klehrs' lack

of diligence precludes us from tolling the statute of limitations due to fraudulent concealment.[9]

III.

The Klehrs argue that the district court erred by holding that their civil RICO claims were barred by the statute of limitations. Civil RICO claims are governed by a four-year statute of limitations. Association of Commonwealth Claimants v. Moylan, 71 F.3d 1398, 1402 (8th Cir. 1995). This circuit employs a discovery accrual standard to civil RICO claims; under this standard, such an action begins to accrue "as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." Id. (inner quotes omitted)[10] The date when the injury and the pattern should have been discovered is subject to a standard of reasonableness, id., not unlike the standard for fraud claims outlined above. Thus, it is incumbent upon the Klehrs to show that it would not have been reasonable to discover the

[9] We likewise reject the Klehrs' claims that, in the alternative, AOSHPI is equitably estopped from asserting the statute of limitations because of the repairs that were made to the Harvestore silo in approximately 1982. There is no evidence that AOSHPI represented that these repairs would cure the myriad of problems outlined above that the Klehrs had been experiencing. In any event, the Klehrs admit that after the repairs were made the same problems which they previously experienced continued. Thus, equitable estoppel is inapplicable in this case.

[10] The Klehrs assert a claim under 18 U.S.C. § 1962(a) for injury resulting from the reinvestment of income from the RICO enterprise in addition to their claim under 18 U.S.C. § 1962(c) based on a pattern of racketeering activity. The Klehrs contend that both claims are governed by the same discovery accrual rule, and we will assume, without deciding, that the same accrual rule applies to both causes of action.

existence, source, and pattern of their injury by August 27, 1989.

The Klehrs' RICO claims are premised on allegedly fraudulent advertising and promotional materials that they received through the mail from AOSHPI on a continuous basis before and after they purchased the Harvestore. The Klehrs claim that AOSHPI distributed similar materials to individuals throughout the United States during this period. They contend that these materials made the same fraudulent misrepresentations concerning the attributes and the benefits of Harvestore silos that they relied on in deciding to purchase their unit.

However, we agree with the district court that the facts which should have put the Klehrs on notice of a possible cause of action for fraud should also have alerted them to the existence, source, and pattern of the injury for their RICO claim. As noted above, the Klehrs knew or should have known shortly after purchasing the Harvestore that AOSHPI's representations concerning the silo's attributes were simply not coming true and thus should have recognized the existence and source of their injury. Likewise, given that the Klehrs received numerous promotional materials and advertisements in the mail before and after they purchased the silo, they should have known that the misrepresentations were part of a pattern of suspected racketeering activity. We believe that the Klehrs should have determined that the representations were part of a pattern of racketeering activity when they should have identified the Harvestore as the cause and source of their problems. See Agristor v. Financial Corp. v. Van Sickle, 967 F.2d. 233, 241-42 (6th Cir. 1992) (stating in analogous case that "as a matter of law, [the plaintiff] should have determined that the representations were part of a pattern at the same time it should have discovered that the silos caused the alleged problems on the dairy farm.").

The Klehrs urge us to adopt "a separate accrual rule," which would permit them to recover damages for predicate acts that occur within the limitations period, even if their claim for similar damages caused by similar predicate acts outside of the four-year period are time-barred. In essence, then, the Klehrs request that we adopt the "last predicate act" accrual rule outlined by the Third Circuit in Keystone v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988), or a variation thereof. However, in Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991), we declined to adopt such an "open-ended" standard, observing that it was inconsistent with "the underlying policy of a statute of limitations requiring due diligence on the part of the plaintiff." 924 F.2d at 154. Instead, we adopted an approach under which a plaintiff has four years to bring his claim from the point in time that he knew, or in exercising reasonable diligence should have known, of the existence and source of his injury and that the injury was part of a pattern, or his RICO claims are forever barred. Id. The principles expounded in Granite Falls preclude us from adopting the standard that the Klehrs propose.

We likewise reject the Klehrs' related assertion that their RICO claims are revived because of the "continuing damage" they sustained into the limitations period through the continued use, operation, and repair of the Harvestore silo. Again, Granite Falls provides the governing principle: it makes clear that a civil RICO action accrues with respect to "each independent injury" to the plaintiff. 924 F.2d at 154. The Klehrs would have us hold that each advertisement or promotional material that was sent to them or that they observed constitutes a separate "injury." However, these injuries are not "independent injuries" because they are all of the same type, flow from the same source, and are part of one cognizable pattern of conduct AOSHPI's alleged misrepresentations regarding the Harvestore unit. We believe

that these separate, discrete "injuries" that the Klehrs identify are more appropriately categorized as one single, continuous injury that was sustained sometime in the 1970s and for which the limitations period commenced long before August 27, 1989. See Glessner v. Kenny, 952 F.2d 702, 708 (3d Cir. 1992) ("the mere continuation of damages into a later period will not serve to extend the statute of limitations."). Thus, the Klehrs' civil RICO claims are time-barred.[11]

IV.

We have examined the Klehrs' numerous other arguments and determine that they lack merit for the reasons given by the experienced district judge in his well-reasoned opinion. Accordingly, for the reasons enumerated above, we affirm the district court's grant of summary judgment to AOSHPI.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[11] We reject the Klehrs' argument that federal equitable tolling principles save their claim from being barred by the statute of limitations. The Klehrs' failure to act with due diligence precludes the application of this doctrine. See Johnson v. United States Postal Service, 861 F.2d 1475, 1481 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989). See also Wilson v. United States Government, 23 F.3d 559, 561 (1st Cir. 1994) ("[f]ederal courts have allowed equitable tolling only sparingly.").

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Marvin Klehr and Mary Klehr,

Plaintiffs, Civil No. 3-94-424

v. **MEMORANDUM OPINION AND ORDER**

A.O. Smith Corporation and
A.O. Smith Harvestore
Products, Inc., Jointly and
Severally,

Defendants.

INTRODUCTION

This action arises out of plaintiffs Marvin and Mary Klehr's purchase of a Harvestore silo in July, 1974. Plaintiffs claim that Defendants misrepresented material facts with respect to the characteristics of the Harvestore silo, causing the Klehrs damage. Before the Court is Defendant A.O. Smith Harvestore Products, Inc.'s ("AOSHPI") motion for summary judgment on all of Plaintiffs' claims based upon the expiration of the applicable statutes of limitations. Defendants argue that the action is time-barred because Plaintiffs failed to commence their lawsuit until August 23, 1993, nineteen years after purchasing the silo. For the following reasons and based upon all records, files and proceedings herein, Defendant's motion for summary judgment will be granted.

FACTUAL BACKGROUND

I. Plaintiffs' Purchase of the Harvestore Silo

The Klehrs purchased a 25 x 80 foot Harvestore silo on July 15, 1974, and began to use it in the summer of 1975.[1] The Klehrs stored chopped alfalfa haylage and occasionally silage in the silo. Richard Deutsch, a salesperson for MVBA Harvestore Systems, sold the silo to the Klehrs. Deutsch supplied the Klehrs with literature and films representing the qualities and benefits of the Harvestore silos. The Klehrs claim that they purchased the Harvestore based upon the following representations:

1. That A.O. Smith Corporation was a one-hundred year old company that "backed" the product and that AOSHPI was twenty-five years old and had the backing of A.O. Smith.
2. That MVBA Harvestore Systems representatives were authorized Harvestore dealers and were the repository of all research regarding the Harvestore silos.
3. Because of a unique "oxygen-limiting" breather bag, no oxygen would contact the feed during storage, resulting in better feed quality;
4. Because oxygen would not contact the feed, there would be no spoiled and moldy feed from the Harvestore silo;
5. Because of the higher quality feed, Plaintiffs would have healthier cows, realize an increase in milk production of three to five pounds per cow per day, and be able to

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[1] In 1955, Marvin Klehr's father purchased a second Harvestore silo which has been in use on the Klehr farm from 1955 to the present. This silo is not part of the lawsuit.

significantly reduce or eliminate the protein supplements in their rations; and

6. Plaintiffs would realize more profits and as a result the silo would pay for itself in four to five years.

Marvin Klehr ("M.K.") Dep. at 149-169, 183, 611-12. All of the promised benefits stemmed from the oxygen-limiting feature, which constituted the most important factor in the Klehrs' decision to purchase the Harvestore silo over a cheaper stave silo. Id. at 761-62.

Prior to 1974, Marvin Klehr was an experienced farmer. He concedes that he knew before 1974 that exposure of feed to oxygen causes mold and spoilage and that feeding animals spoiled and moldy feed could harm the animals. Id. at 114-19, 124.

II. Plaintiffs' Experience With the Harvestore Silo

A. Feed Quality and Appearance

Defendants represented that because of the oxygen-limiting breather bag, no oxygen would contact the feed, yielding higher quality feed than conventional silos. Based on these representations, Plaintiffs did not expect to observe mold in feed stored in the Harvestore silo. Id. at 150-67, 611-12. Beginning in 1976, however, Klehr observed in the feed a few white chunks of mold, about the size of a spoon. Concerned about the mold, Klehr inquired of Deutsch as to the cause. Deutsch explained that the mold came from the top layer on the silo and was "normal." According to Deutsch, at the time of filling oxygen entered the silo long enough to cause "a little damage." Deutsch dep. at 293-95. Deutsch told Klehr to expect a light layer of mold between each filling. Klehr accepted Deutsch's explanation.

Klehr observed light layers of mold between layers and in the spring each of the following years thereafter. Klehr also noticed within weeks of each filling that the feed turned a

brown color and smelled like molasses. Klehr did not consider the change in color or odor significant, however, based upon Harvestore's advertising brochures. Advertisements for the silo described Harvestore haylage as "mildly-fermented, molasses-like feed." Ex. 1 to M.K. Aff. According to Harvestore, the fermented smell enticed the cows to eat a lot of the feed. Klehr, therefore, believed that the brown, molasses-smelling feed coming from the silo was normal.

In the spring of 1977, at the end of the feed from the 1976 harvest, Klehr again saw mold, ranging from the size of a quarter to the size of a half dollar, and noticed that the feed had turned much darker brown in color and smelled musty. M.K. Dep. at 297-99. Klehr loaded the spoiled feed into his manure spreader and dumped it in the field. Subsequently, each time Klehr emptied the silo he hauled about two spreader loads of spoiled feed out to the field. He considered one or two spreader loads insignificant. Klehr continued this practice of dumping about two spreader loads of spoiled, moldy feed in the field every spring thereafter. Id. at 349.

One spring, between 1979 and 1982, Klehr observed that the spoilage occurred earlier than usual; the feed became much darker brown and contained significantly more and larger chunks of mold. Id. at 311-12. Klehr immediately shut down the silo and stopped feeding that feed to the cows. He hauled approximately twelve spreader loads out to the field, as opposed to the usual two loads. Id. at 313. That year, Klehr spoke to Deutsch about the heavy spoilage. Deutsch and other MVBA representatives checked Klehr's silo and fixed a broken breather bag. They then pressure tested the silo and reported to Klehr that it was repaired. Id. at 319-20. Subsequently; the feed returned to "normal," requiring Klehr to dump one or two spreader loads when cleaning the silo in the spring.

B. Herd Health

In the years following his purchase of the Harvestore, Klehr experienced numerous ailments with his herd. Around 1980, Klehr noticed that his herd began to have diarrhea and digestive problems, although it occasionally had suffered diarrhea, or "winter dysentery," in the past. M.K. dep. at 413. Beginning after 1975 the herd had problems with displaced abomasums, or "twisted stomachs." Klehr had not experienced this problem prior to 1975. He consulted his veterinarian, Dr. Klimmek, who advised Klehr that the feed was too finely chopped. Id. at 420-22. Dr. Klimmek did not indicate that the problem with the consistency of the feed was caused by the feed storage unit. Id.

In approximately 1983, Klehr noticed his cows "going off feed." The feed representative adjusted the rations to resolve this problem. The representative did not associate this problem with the silo; rather, Klehr believed he was feeding his cows too much. Id. at 416-19.

Klehr observed an increase in uterine infections beginning around 1980. Klehr recently had doubled the size of his herd from forty-five to ninety; even with the larger herd, however, the percentage of uterine infections significantly increased. Id. at 427. Klehr spoke to his feed salesmen about the problem several times. They concluded that the cows lacked "some type of vitamin." Id. The feed salesmen added Selenium in addition to vitamins A, D, and E to the diet. Id. at 429.

Also in 1980, the herd began to experience foot problems. Klehr's feed salesman added minerals to the rations to treat the problem. In about 1977 Klehr observed swelling and bruises around the joints on the cows' hind legs. He had never seen this condition prior to 1977. Klehr's veterinarians operated on some of the cows, but were unable to diagnose the cause. His veterinarians did not connect the leg problems to the Harvestore silos.

After 1975 Klehr also noticed that his cows were thin and unthrifty, their coats were rough and their eyes were dull. Id. at 440-41. Klehr's feed salesmen told him "they knew that these cows were still lacking something." Id. at 445-56. They advised Klehr to alter his ration so that the cows would get "a little bit more grain, or a little bit more feed." Id. at 444. Again, no one related the unthriftiness or the dull appearance to the Harvestore silo.

C. Breeding and Reproduction

In the years after 1975, Klehr experienced significant breeding and reproduction problems with his herd. Although the problems occurred over a period of time and did not "hit him overnight," they increased subsequent to the purchase of the Harvestore. Klehr observed, for example, a problem with premature abortions. When asked when this problem began, Klehr stated, "It's been a long time. I guess looking back, maybe at the start of the Harvestore system, yes." M.K. dep. at 479. Klehr recalls his herd's conception rate during the years he used the Harvestore as "very poor," and he was "very dissatisfied with it. Id. at 535. The Dairy Herd Improvement Association ("DHIA") records, which Klehr received monthly during this time period, confirmed the poor conception rate. Klehr believed this problem had existed for ten years prior to filing his state court lawsuit in 1991. Id. at 535-36.

After purchasing the Harvestore, Klehr also observed long calving intervals compared to reported averages for Minnesota farmers. Id. at 464-65. Klehr investigated the reproduction problems with his veterinarians and feed salesmen, who increased vitamin E and Selenium in the rations. The veterinarians pregnancy tested the cows and told Klehr that some cows had cysts; none, however, indicated that the problems related to the silo.

D. Milk Production

Klehr testified that during the period he used the Harvestore silo, he believed he received the expected increase in milk production. M.K. Dep. at 384-89. Whenever Klehr noticed a decrease in milk production, he attributed the problem to factors other than the Harvestore silo. For example, Klehr believed that his increase in his herd from forty-five to ninety cows depressed the milk production. He also voluntarily reduced his production for eighteen months in accordance with a dairy diversion program. Finally, Klehr attributed any depression of milk production to his herd's health problems, such as the foot problems and uterine infections.

In contrast to his belief that he received the expected increase in milk production from Harvestore, Klehr determined, after reviewing the DHIA records, that his production "was not going anywhere over the years." Id. at 512. These DHIA records were available to Klehr monthly during the entire period he used the Harvestore silos. Id. at 513. Klehr did not complain about his milk production to anyone until 1990, when he told Deutsch that he should be producing more milk. Id. at 378-79.

F. Protein Savings

Contrary to Harvestore's representations that the silo would eliminate the need for protein supplements, Klehr at all times had to add protein to the rations. Id. at 699-701. Klehr inquired of Deutsch regarding his failure to realize protein savings. Deutsch explained that due to increased production in recent years, the cows required more protein. Id. at 713. Klehr testified that he believed the need to supplement the feed with protein was due to various reasons, such as the way he

was "putting up" his haylage or that his fields were not clean enough. Id. at 700-701.

G. Profitability

During the period he used the Harvestore silo, Klehr believed he was receiving the promised profits. M.K. dep. at 644. After filing the state court lawsuit, however, Klehr reviewed his DHIA records and determined that the representations of increased profitability were false. Id. at 511-12. Klehr received DHIA records outlining his profits the entire time he used the silo. Mary Klehr testified that Plaintiffs experienced extreme financial hardship from the early 1980's to 1991 or 1992 due to low milk production. Mary Klehr Dep. at 23, 104-106.

When asked about profits incurred or lost in specific years, Klehr testified:

> At the end of the year, I had an enterprise of hogs, milk, crops, and who knows whatever else. It was all thrown into one kitty, and I never once thought it was because of my Harvestore not giving me the profit or not doing what it was supposed to. Could have been the bad hogs, or bad weather, bad crops . . . . I farmed long enough that you cannot project ahead a whole year what you think you are going to get, because it never comes out that way. You take what the good Lord gives you.

Id. at 688-89.

III. Discovery of the Alleged Defect

Plaintiffs allege that Defendants continued to misrepresent to them the characteristics of the Harvestore silos after the purchase. They claim to have received fraudulent

representations in the mail from 1969-91, specifically twenty pieces of advertising before the purchase and thirty-eight pieces of advertising after the purchase. Amended Complaint ¶¶ 10, 15, 16.

Plaintiffs contend that A.O. Smith Corporation knew of the alleged design flaws in the Harvestore silo since the 1960's, but deliberately concealed the defects from consumers. Plaintiffs claim that Defendants' conduct in concealing the deficiencies in the silos while continuing to misrepresent their qualities, prevented them from discovering the defect in the Harvestore silo as the source of the problems with their herd.

In 1991, however, Klehr saw an article in a Minneapolis newspaper regarding a verdict against AOSHPI in Olmsted County, Minnesota. Shortly thereafter, Klehr contacted the University of Minnesota about a mastitis problem with his herd. The University referred Klehr to Dr. William Olson, a veterinarian and Ph.D. In April 1991, Olson visited the Klehr farm and looked inside the Harvestore silo. This was the first time Klehr had looked in the silo prior to unloading. They observed large amounts of mold. Klehr claims that at that point, in April 1991, he realized for the first time that he had been feeding his herd moldy feed for fifteen years and that the spoiled feed had caused his herd significant health problems. See M.K. Aff. ¶ 10; Olson Aff. ¶ 2A-B, 7.

Plaintiffs commenced this action on August 27, 1993, alleging: common law fraud (Counts I and II); violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (Counts III and IV); common law negligent misrepresentation (Count V); and violations of Minnesota Statute sections 325F.67, 325F.68-70, 325D.13, 325D.44 (Counts VI-IX).[2]

[2] Plaintiffs previously filed an action in state court alleging all but the federal RICO claims. On August 18, 1993, Plaintiffs voluntarily dismissed the state court action pursuant to Minnesota Rule of Civil Procedure 41.01. Plaintiffs then filed suit in federal court against

DISCUSSION

I. STANDARD FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, a moving party is entitled to summary judgment if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of establishing the non-existence of a genuine issue of material fact. Id. at 323; City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-op., 838 F.2d 268, 273 (8th Cir. 1988). Once it meets that burden, the non-moving party may not then "rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If, based upon the evidence, a reasonable jury could not return a verdict for the non-moving party, summary judgment is appropriate. Id. at 248.

II. FRAUD CLAIM

A. Discovery of Fraud

Under Minnesota law, a party must commence a cause of action for fraud within six years from the date of "discovery by the aggrieved party of the facts constituting the fraud." Minn. Stat. § 541.05 subd. 1(6). The date of discovery is subject to a standard of reasonableness. Bustad v. Bustad, 116 N.W.2d 552, 555 (Minn. 1962); Blegen v. Monarch Life Ins. Co., 365 N.W. 2d 356, 357 (Minn. Ct. App. 1985). Thus, "'the facts

AOSHPI, but dropped the claims against MVBA Harvestore, a Minnesota-based independent dealer.

constituting the fraud are deemed to have been discovered when, with reasonable diligence they-could and ought to have been discovered.'" Bustad, 365 N.W. 2d at 357 (citations omitted).

A party's failure actually to discover the fraud will not toll the statute of limitations if such failure of discovery is "inconsistent with reasonable diligence." Id. The plaintiff carries the burden of proving that he did not, and could not through the exercise of reasonable diligence, discover the fraud within six years before commencement of the action. Blegen, 365 N.W.2d at 357.

The Court recognizes that "normally in a statute of limitations context fraudulent concealment and a plaintiff's due diligence are questions of fact unsuited for summary judgment." Hines v. A.O. Smith Harvestore Prods., Inc., 880 F.2d 995, 999 (8th Cir. 1989). Where "the evidence leaves no room for a reasonable difference of opinion," however, the district court properly may resolve fact issues as a matter of law. Miles v. A.O. Smith Harvestore Prods., Inc., 992 F.2d 813, 817 (8th Cir. 1993).

The Klehrs commenced this action on August 27, 1993. If, therefore, the statute of limitations for fraud began to run prior to August 27, 1987, Counts I and II will be time-barred. Defendants contend that the Klehrs knew or should have known shortly after they began using the Harvestore that the silo did not perform as represented and that they were not receiving the promised benefits.

The Klehrs maintain that they did not discover the facts constituting the fraud until April 1991, when Dr. Olson visited the farm and Klehr for the first time saw the moldy feed inside the silo. They assert that they exercised reasonable diligence in attempting to determine the cause of the problems they experienced with their herd over the years.

The evidence shows that the Klehrs should have known shortly after using the Harvestore silo that they were not

receiving the represented benefits which induced them to purchase the silo. Mr. Klehr, an experienced farmer, knew that exposure to oxygen causes mold and spoilage harmful to animals. Despite Harvestore's representation that the breather bag would prevent oxygen from contacting the feed and thus eliminate spoilage, Klehr almost immediately observed chunks of mold in his feed. The mold persisted each year Klehr operated the Harvestore. Each year he dumped spoiled feed in the field. The year Klehr noticed a significant increase in mold, along with a darker color and more pungent smell, he recognized the potential harm to his herd and dumped twelve spreader loads of spoiled feed in his field. M.K. dep. at 311-12.

The entire time he observed chunks of mold in his feed, Klehr's herd experienced numerous health problems. Contrary to Defendant's representations that feed from the Harvestore would result in healthier cows, Klehr saw an increase in digestive problems, uterus infections, foot and leg problems and displaced abomasums. Klehr's cows had dull coats and eyes and were thin and unthrifty. Additionally, the conception rates during his use of the silo were very poor and he experienced increased miscarriages and long calving intervals.

Although certain health problems had occurred prior to 1975, Klehr concedes that many problems increased after the purchase of the silo and that others began for the first time after 1975. While the deterioration in herd health and decrease in reproduction rates did not "hit [Klehr] overnight," these problems, directly contrary to Harvestore's representations, should have been apparent to Klehr at the latest by the early 1980s.

Additionally, Klehr concedes that he never realized any protein savings by using the Harvestore. In stark contrast to the advertisements, Klehr had to supplement the feed with protein at all times. Despite added protein and other vitamins,

his cows remained unthrifty and "were still lacking something."

Klehr contends that he reasonably investigated with his veterinarians, feed salesmen and nutritionists each and every problem he experienced with his herd. He maintains that because his experts failed to attribute the problems to the silo, he should not be charged with knowledge that the Harvestore was the source.

Although Klehr's experts failed explicitly to link the Harvestore to the problems with his herd, nothing prevented Klehr from discovering the connection. Klehr knew that oxygen caused mold and that spoiled feed could harm cows. In light of the numerous health and reproduction problems he experienced over the years, Klehr should have included the silo among the potential sources of his problems. Despite contrary explanations, Klehr should have made the connection and taken further steps to investigate the silo as the potential cause. As stated in Veldhuizen v. A.O. Smith Corp., 839 F. Supp. 669, 676 (D. Minn. 1993), "[t]he limitations period does not wait to run until the plaintiffs were able to make a causal connection between the failure of the silo to perform as promised and a particular design defect." Rather, the Klehrs had an affirmative duty to investigate the silo as a cause; the failure to do so is inconsistent with their duty of reasonable diligence. See Blegen, 365 N.W.2d at 357. See also Johnston v. Agristor Credit Corp., Civ. No. 84-4421-S (D. Kan. 1987) ("It appears from the record that the Johnstons did everything but check their new equipment; such action is not enough to satisfy the requirement that the fraud not be discoverable until December 1982").

Although the Klehrs did not actually discover the causal connection between the silo and the problems with their herd until April 1991, they should have realized well before 1987 that the representations regarding the characteristics of the Harvestore silos were false.

Furthermore, Klehr should have known that he was not realizing the promised increase in milk production and profits which induced him to purchase the silo. He had at his fingertips his monthly DHIA reports indicating that his milk production "was not going anywhere over the years." M.K. dep. at 512. Similarly, by simply reviewing the DHIA records, Klehr could have learned that he was not receiving the increased profits from his dairy business. Klehr's failure to separate his profits from his various enterprises, rather than combining the proceeds from his entire farm operation "into one kitty," is inconsistent with reasonable diligence as a matter of law.

The Court holds that Plaintiffs should have discovered, through the exercise of reasonable diligence, any fraud committed by Defendants long before 1987.

B. Fraudulent Concealment

Plaintiffs also argue that the statute of limitations should be tolled because Defendants fraudulently concealed the cause of action. "Fraudulent concealment tolls the statute of limitations until the party discovers, or has a reasonable opportunity to discover, the concealed defect." Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 918 (Minn. 1990). The limitations period is tolled, however, "only if it is the very existence of the facts which establish the cause of action which are fraudulently concealed." Id. at 918-19. Further, "there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action." Wild v. Rarig, 234 N.W.2d 775, 795 (Minn. 1975). Showing that a defendant fraudulently concealed an alleged defect is insufficient; a plaintiff must show that he actually was unaware of the existence of the defect before the statute of limitations will be tolled. Hydra-Mac, 450 N.W.2d at 919.

The Klehrs contend that Defendants knew the Harvestore silos were defective and deliberately concealed the defects from them. They assert that Defendants, through fraudulent advertising, misrepresented the characteristics of the Harvestore before and after the sale. These continuing misrepresentations, the Klehrs claim, concealed the defect and prevented discovery of the fraud; therefore, the statute of limitations should be tolled under the doctrine of fraudulent concealment.

The Court finds that the fraudulent concealment doctrine does not apply to toll the statute of limitations. Defendants here took no affirmative steps which prevented discovery of the very facts establishing the cause of action. "[P]roviding the [Klehrs] with the post-sale materials does not rise to the level of affirmative concealment necessary to toll the statute of limitations." Veldhuizen, 839 F. Supp. at 675.

Moreover, the post-sale advertisements could not have concealed from the Klehrs the facts constituting the alleged fraud, namely that the Harvestore did not perform as represented. The Klehrs had only to look at the feed coming from the silo and observe the health of their herd to know that they were not getting better quality feed, protein savings and healthier cows. Further, they had only to look at the monthly DHIA reports to recognize that the promised increase in milk production and profits had not materialized. As the court stated in Miles v. A.O. Smith Harvestore Products, Inc.,

> In the present case, Harvestore took no steps to conceal the facts giving rise to appellant's cause of action. It would have been impossible for Harvestore to have done so--the evidence was in appellant's yard, in daily use for the feeding of her animals. Appellant by the exercise of reasonable diligence should have realized that Harvestore had misrepresented the qualities of the silos.

Miles, 992 F.2d at 816.

Additionally, any management suggestions by Harvestore representatives did not, as a matter of law, rise to the level of fraudulent concealment. The representatives neither criticized Klehr's management of the silo nor attributed the mold, health problems or low milk production to Klehr's mismanagement. M.K. dep. at 325-28, 332-35, 710-12. Defendants did not affirmatively act with a design to prevent, and did not prevent, Plaintiffs' discovery of the facts establishing their cause of action. Accordingly, the statute of limitations will not be tolled for fraudulent concealment.

III. RICO CLAIMS

Plaintiffs also allege RICO violations under 18 U.S.C. §§ 1962(a)[3] and (c).[4] A four year statute of limitations applies to civil RICO claims. Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156-57 (1987). Plaintiffs' RICO claims are thus barred if the statute of limitations began to run prior to August 27, 1989. A civil RICO claim accrues from the time that the plaintiff "discovers, or reasonably

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[3] Section 1962(a) provides in relevant part,

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce.

[4] Section 1962(c) provides,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."

should have discovered, both the existence and source of his injury and that the injury is part of a pattern."[5] Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991) (quoting Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1554-55 (11th Cir. 1990), cert. denied 500 U.S. 910 (1991)). As with the statute of limitations for fraud, the date when the injury and the pattern should have been discovered is subject to a standard of reasonableness. Id.; Veldhuizen v. A.O. Smith Corp., Civ. No. 4-92-1131 (D. Minn. Dec. 30, 1993).

As evidence of a pattern of racketeering, Plaintiffs allege receiving from Defendants twenty pieces of fraudulent advertising through the mail prior to their purchase of the Harvestore, and thirty-eight pieces of fraudulent advertising subsequent to the purchase. Plaintiffs allege a pattern of fraudulent representations by Defendants continuing for a period of more than twenty years.

The Court finds that Plaintiffs should have discovered the existence and source of the alleged injury and that the injury was part of a pattern at the same time they should have discovered the fraud. The same facts which should have alerted them to the fraud also should have alerted them that the alleged misrepresentations and injuries were part of a pattern. See AgriStor Financial Corp. v. Van Sickle, 967 F.2d 233, 242 (6th Cir. 1992) ("as a matter of law [the plaintiff] should have determined that the representations were part of a pattern at the sane time it should have discovered that the silos caused the alleged problems on the dairy farm").

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[5] Plaintiffs cite no authority for their contention that the discovery accrual rule applies to Section 1962(c) but not to 1962(a). Because under both sections the injury results from the defendant's pattern of racketeering activity, the discovery accrual rule will apply to both RICO claims.

Plaintiffs contend that even under the discovery accrual rule set forth in Bivens Gardens and Granite Falls, a new cause of action accrues each time a party suffers an injury caused by a violation of 18 U.S.C. § 1962. Because they suffered damages until 1991, Plaintiffs maintain, a new RICO claim accrued with their last injury, rendering their 1993 lawsuit timely.

The Court rejects Plaintiffs' "last injury" argument. Although separate limitations periods may accrue from new injuries, the separate accrual is limited to distinct and independent injuries. Glessner v. Kenny, 952 F.2d 702, 707 (3rd Cir. 1991); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1103 (2nd Cir. 1988), cert. denied, 490 U.S. 1007 (1989). In Glessner, the plaintiffs brought their RICO actions in 1988 after the defendants had ceased production of an allegedly defective furnace in 1983, thus ending the pattern of racketeering. The plaintiffs argued that although they first suffered injury, in the form of excessive repairs, prior to the expiration of the four year statute of limitations, they suffered a new and independent injury in 1984 when they had to replace the furnace. This new injury, they claimed, reset the statute of limitations. Glessner, 952 F.2d at 706-07. The court found that the plaintiffs' replacement of the furnace did not constitute a new and distinct injury but rather a continuation of their initial injury. As the court stated, "the mere continuation of damages into a later period will not serve to extend the statute of limitations." Id. at 708.

Similarly, the injury allegedly suffered by the Klehrs through 1991 does not qualify as an independent and distinct injury, but rather a continuation of the damages they suffered since using the Harvestore silo in 1975. Their injury arises out of Defendants' initial alleged wrongdoing, namely the fraudulent misrepresentations.

Because the Klehrs should have discovered the existence and source of this injury and that it was part of a pattern at the

sane time as they should have discovered the fraud, long before August 1989, their RICO claims are time-barred.[6]

IV. STATUTORY CLAIMS

Counts VI through IX of Plaintiffs' Amended Complaint assert claims for violations of the Minnesota False Statement in Advertisement statute (Minn. Stat. § 325F.67), the Minnesota Consumer Fraud Act (Minn. Stat. § 325F.68-70), the Unlawful Trade Practices Act (Minn. Stat. § 325D.13), and the Uniform Deceptive Trade Practices Act (Minn. Stat. § 325D.44). Minnesota Statute section 541.05 subd. 1(2) imposes a six year statute of limitations for claims based on liability created by statute. This provision does not include a discovery allowance as does the statute of limitations applicable to fraud claims. Minn. Stat. §541.05 subd. 1(2); Veldhuizen, 839 F. Supp. at 677. Thus, the six year limitations period commenced on the date of sale, 1974, when each of the alleged statutory violations occurred. Id. Accordingly, Plaintiffs' statutory claims are time-barred.

V. NEGLIGENCE CLAIM

Plaintiffs allege in Count V a claim for negligent misrepresentation. Under Minnesota law, a six year limitations period applies to negligence claims. Minn. Stat. §541.05 subd. 1(5). The statute of limitations begins to run

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[6] For the same reasons as set forth with respect to the common law fraud claims, the doctrine of fraudulent concealment does not apply to toll the statute of limitations under RICO. Even under the federal fraudulent concealment doctrine, the limitations period will not be tolled unless the fraudulent concealment "misleads a plaintiff into thinking that he does not have a cause of action." Davis v. Grusemeyer, 996 F.2d 617, 624 (3rd Cir. 1993). As discussed supra, Defendants did not conceal the facts constituting the cause of action.

on negligence claims "when the negligent act or omission causes injury on which the injured party could maintain an action." Wittmer v. Ruegemer, 419 N.W.2d 493, 496 (Minn. 1988). Because Plaintiffs, alleged injuries began immediately after using the silo in 1975, the six year statute of limitations bars their negligence claim.

Even if not barred by the statute of limitations, Plaintiffs may not recover for negligence under the economic loss doctrine. See Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981) ("economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability"). As a matter of law, the damages claimed by the Klehrs are non-recoverable economic loss. Veldhuizen, 839 F. Supp. at 677. Under either theory, therefore, Plaintiffs' claim for negligence alleged in Count V will be dismissed.

CONCLUSION

Based on the foregoing and all the files, records and proceedings herein, the defendants' Motion for Summary Judgment (Doc. No. 120) is **GRANTED** and Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 6, 1995.

s/s
MICHAEL J. DAVIS, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1355MNST

Marvin Klehr; Mary Klehr;	•	
	•	
Appellants,	•	
	•	Appeal from the
William G. Olson,	•	United States
	•	District Court for the
Intervenor,	•	District of Minnesota
	•	
v.	•	
	•	
A.O. Smith Corporation; A.O. Smith	•	
Harverstore Products, Inc.,	•	
Jointly and Severally,	•	
	•	
Appellees.	•	

The petition for rehearing filed by the appellants' has been considered by the court and is denied.

July 29, 1996

Order Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

Mr. Charles A. Bird
BIRD & JACOBSEN
305 Ironwood Square
300 Third Avenue, S.E.
Rochester, MN 55904

United States District Court
of Minnesota
August 12, 1996

RECORD 0F DOCKET TEXT

3:94-cv-00424 Klehr v. A O Smith Corp

DOCKET ENTRY

CERTIFIED COPY OF OPINION & JUDGMENT FROM USCA (Fagg) (Heaney) (Hansen) - J; filed 6/6/96 that the judgment of the District Court in this cause is affirmed in accordance with the opinion of the Eighth Circuit. [223-1] (17pgs) (cc: All Counsel) Mandate issued 8/9/96

Hon. Michael J Davis, Judge

THIS NOTICE SENT TO ALL COUNSEL

LAW DEPARTMENT

Subject: Continuing Harvestore Difficulties

Date: January 3, 1968

Attention:

Messrs. L. B. Smith
U. T. Kuechle
A. D. Hyde
M. E. Morgan
R. F. McGinn
R. C. Smith
Howard Johnson
Cloy Knodt

From: James N. Johnson
Dept. 0116
Location: Milwaukee

During the development by the plaintiffs of the evidentiary facets of their cases in the California courts, the most prolific source for such development, to which they turned again and again, was the voluminous reports and memoranda issued by one department or division head to another, or by division or department heads to outsiders, such as dealers. In many respects, these memos formed every bit as much damning evidence as did any of the advertisements or promotional pieces upon which the plaintiffs sought to rely.

Admittedly, a large corporation such as ours moves forward, even though slowly, it appears sometimes, on exchange of pieces of paper. No one knows more poignantly, than do lawyers, how necessary writings sometimes may be in order that points of view can be clearly expressed and accurately memorialized. We will be the first to insist that writings, in many cases, are absolutely necessary.

However, in times such as those through which Harvestore is passing, and when it appears that its mechanical problems are yet far from solution, I suggest that the writings with respect to such problems be kept to an absolute minimum and, to the degree that they appear to be necessary, they should be addressed to the law Department, with copies to those to whom they might otherwise be addressed, so that each memo will receive, as it properly should, the mantle of privileged communication and, thus, be secure from seizure by subpoena in discovery proceedings if additional litigation should ensue.

Product failures and the claims made against the Company in connection therewith, along with any responsibility of the Company's undertaking to correct such failures, all are matters of appropriate reference to the Law Department for analysis and suggestion. They are a joint problem between administrative engineering, sales, and law, but, ultimately, reflect the possible legal claims and attending litigation. Therefore, their joint assessment and correction under the supervision of the Law Department is not only proper as a matter of form, but also as a matter of substance, and any writings in connection therewith, so long as they are addressed to the Law Department with copies to the responsible administrative engineering or sales executive involved, will be secure from seizure.

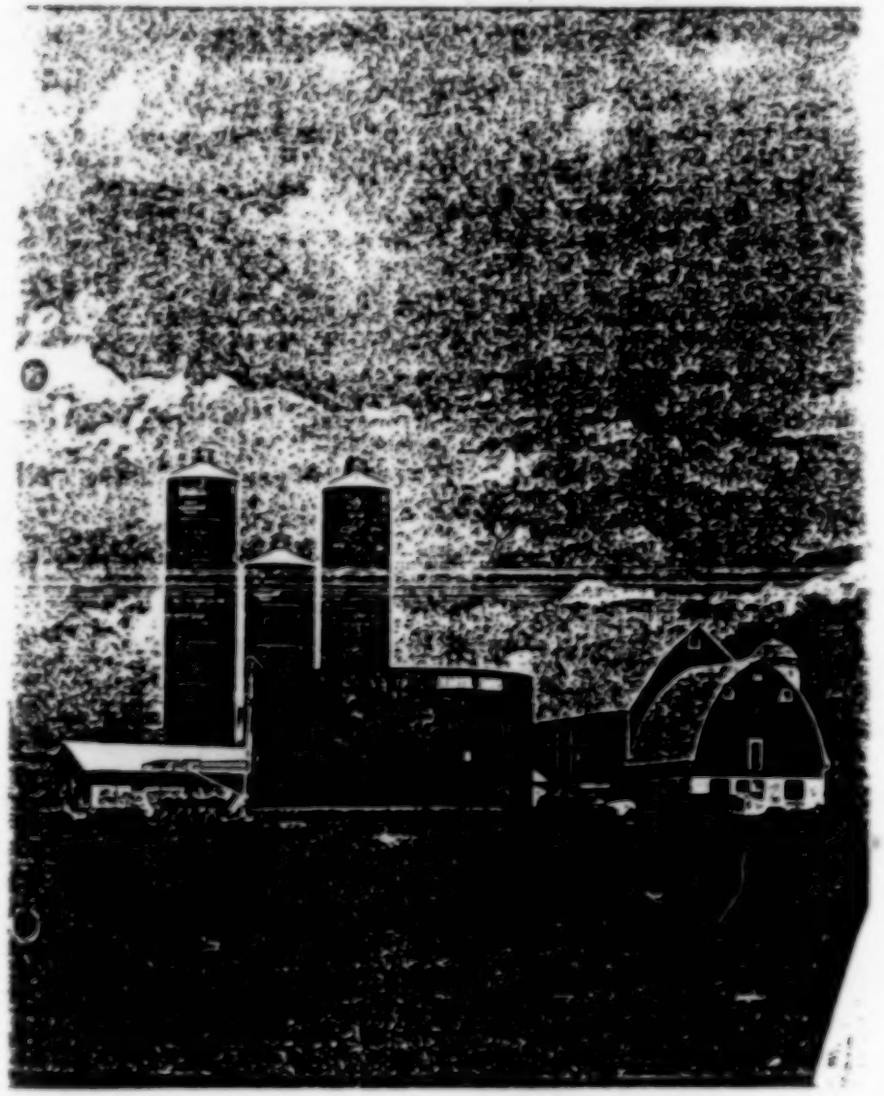
Therefore, I earnestly solicit your cooperation to frame your memos in the manner I have suggested above, so that notwithstanding they are addressed to the Law Department, the copies to the interested executives will permit the work to move forward without fear of having the substance of the memos being used against us in litigation.

s/s
James N. Johnson

JNJ: bjh

HARVESTORE
SYSTEMS
FARMING

Fall, 1989



A.O. Smith Harvestore Products, Inc.

40 ANNIVERSARY

Aquastore® Harvestore® Permaglas® Slurrystore® Systems

A. O. Smith Harvestore® Products, Inc. is ready for the future, stronger than ever, thanks to a commitment made 40 years ago: never compromise quality. We're proud to be an authorized, independent Harvestore Systems dealer. We thank you, our friends in the farming community, for so many good years.

BUILT ON A STRONG FOUNDATION

HARVESTORE SYSTEMS

A. O. Smith Harvestore Products, Inc.
345 Harvestore Drive
DeKalb, IL 60115

Your Harvestore system dealer . . .

. . . has brought you this complimentary copy of *Harvestore System Farming*, with the hope that the information it contains will help you make your farming more profitable. Your dealer will be happy to answer questions on how Harvestore system farming can benefit your operation. He's ready to serve you in every way possible, with management and planning advice, sales, and service.

ADDRESS CORRECTION REQUESTED

Bulk Rate
U.S. Postage
PAID
Permit No. 88
Jonesboro, AR

HARVESTORE SYSTEMS

The Inside Story:

Nutritious, Cost-Efficient Feed

[illegible]

Retooled Manufacturing Efficiency

[illegible]

New Products For The '90s

[illegible]

Best Engineered Replacement Parts

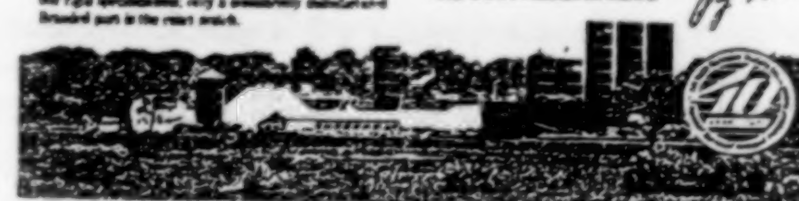
[illegible]

Dependable, Knowledgeable Dealer Network

[illegible]

A.O. Smith Harvestore Products, Inc.
DeKalb, IL 60115
815-756-1551

Oct. 25, 1989
Og 772



The 1990's: Challenges and Opportunities

Join us for a SEMINAR IN THE SUN

Feb. 25-28 -- Las Vegas, Nevada

HARVESTORE SYSTEMS

[illegible]

Name ____________________

Address ____________________

City __________ State ______ Zip ______

Mail to:
SEMINAR IN THE SUN
Harvestore System Farming magazine
345 Harvestore Drive
DeKalb, IL 60115

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Marvin Klehr and
Mary Klehr,

Plaintiffs,

v.

A.O. Smith Corporation and
A.O. Smith Harvestore Products,
Inc., Jointly and Severally,

Defendants.

Case No.: 4-93-822 (JMR)

AMENDED COMPLAINT

Jury trial demanded

Plaintiffs, Marvin and Mary Klehr, by and through their attorneys, as noted below, state the following as their claims in this matter:

[Paragraphs 1-9 deleted]

10. From 1969 up to the date of sale on or about July 15, 1974, AOS, AOSHPI and/or MVBA, both directly and indirectly furnished the Plaintiffs with various sales literature, including, but not limited to:

(a) Printed materials from AOSHPI and AOS regarding the Harvestore structure, which included the following:

(1) On or about January 25, 1974, Plaintiffs received, in the U.S. Mail, the "Hoards Dairyman" magazine which, at page 105, was an advertisement entitled, " Twenty-five Years Ago it All Started With Just One" made and published by Defendants. This advertisement falsely represents that AOSHPI was a twenty-five-year-old company. This ad led Plaintiffs to believe that they were dealing with a single company they knew as "A.O. Smith" that had been around for many years. This advertisement, among other things, caused Plaintiffs to purchase the silo because they believed they were dealing with a very reliable company that had been in business for many years. In reliance upon this representa-tion, Plaintiffs purchased the silo and suffered damages.

(2) In December, 1972, through the U.S. Mail, Plaintiffs received the Harvestore, Farmer, 1973 Buyer's Guide issue, made and published by Defendants (Vol. 11, No. 6), which includes a postage-paid return card for additional Harvestore product information, and states, at Page 6, that Harvestores prevent oxygen from contacting the feed. Plaintiffs believe they may have also received this item at the State Fair in August, 1973, and/or personally from Mr. Deutsch in the summer of 1973. It also has a diagram of the top of a Harvestore structure which shows air going in and out of the breather bags but not in and out of the pressure relief valve or unloader door, thereby falsely implying that no ambient air can reach the stored feed through normal daily use. At page 10 of the Buyer's Guide is a description of the Harvestore dealer. It states the dealer is a professional in farm management and also says that if the dealer "doesn't have the answers himself, he can call on the experts at A.O. Smith Harvestore to help get the answers." Plaintiffs believed and relied upon the design of the silo as described. Plaintiffs believe that, through the dealer, they had access to all the research and knowledge of the experts at A.O. Smith Harvestore. Such Buyer's Guide

issue, and the representations contained therein that were made by A.O. Smith and AOSHPI, were relied upon by the Plaintiffs in purchasing the silo and as a result suffered damages.

(3) In January, 1974, through the U.S. Mail, and also personally from Richard Deutsch, a salesman of MVBA, Plaintiffs received the 1974 Harvestore Farmer Buyer's Guide, (Volume 13, No. 1.), which was made and published by A.O. Smith and AOSHPI in written form. Such Buyer's Guide issue contains false representations, on Pages 4-5, that Harvestore silos prevent oxygen from coming into contact with the feed, and contains false depictions of Harvestore silos, which have no reference to the pressure relief value and/or air coming in through the unloader door. On page 2223 of the Buyer's Guide it states that the network of dealers supports Harvestore owners. It states the dealers are experts in techniques of planting, cropping, harvesting, animal nutrition, farm counseling, installing and service. It says salesman and service workers are trained at "Harvestore's headquarters in Arlington Heights, Illinois." This ad caused Plaintiffs to be very confident in the design and follow-up service available. Plaintiffs believed the dealers, who were trained by A.O. Smith, knew everything A.O. Smith knew about the product and could answer all questions about the silo. This advertisement was relied upon by the Plaintiffs in purchasing the silo and caused them to suffer damages as a result of the use of the silo upon their farm.

(4) Sometime in the early 1970's, before the purchase of the silo, Plaintiffs received, in the U.S. Mail, a brochure entitled "Smile When You Call it a Silo", made and published by A.O. Smith and AOSHPI. Such brochure is in written form and falsely states, at Page 2, that Harvestore silos virtually eliminate storage losses. Said brochure also contains a

coupon, which solicits mail inquiries regarding the Harvestore System. Plaintiffs relied on this ad in purchasing the silo, and suffered damages as a result of using the silo on their farm.

(5) Sometime in the early 1970's, before the purchase of the silo, Plaintiffs received, in the U.S. Mail, from AOSHPI, a brochure entitled, "Revolution in Blue", made and published by A.O. Smith and AOSHPI. Such brochure falsely states, at Page 2, that oxygen-free storage can be maintained in a Harvestore silo and refers to A.O. Smith as backing the product. At Page 4, there is reference to marine hatches, sealing of joints, and a breather system that prevents oxygen from contacting the feed and spoiling it. At Page 5 are photographs of the breather bag system which, it is falsely claimed, prevents oxygen from contacting the feed, but no reference to a relief valve or unloader door. At page 8 is a description of the services available from the dealer. It states that A.O. Smith has participated in dozens of research projects "and the results are available to you from your Harvestore representative". It says "Harvestore researchers" have data from all over the country that is available from the Harvestore representative. Plaintiffs believed that all research done by Defendants was available to the dealers, including MVBA, and was in support of Defendants design claim (air doesn't touch the feed). Plaintiffs relied on these representations in purchasing the silo, and suffered damages as a result of using the silo their farm. Plaintiffs now know this is false because the damaging research was kept secret and confidential by Defendants and never disclosed to the dealer organization, including MVBA.

(6) When Plaintiff's took over the farm, on January 1, 1969, there existed on the farm a "Here's How" operator's manual for their smaller Harvestore silo, which was made and published by A.O. Smith and AOSHPI, and contained

numerous false representations relating to oxygen-free storage, to the air-tight silo solving the problem of air coming in during feeding, and falsely comparing a Harvestore to a fruit jar, and also containing a warranty card for use through the mails. (See Pages 2-3, 2-4, 3-9, 4-8, 5-6, 6-6.) At page 22 it states the Harvestore dealer has all. the answers because the dealer is backed by one of the most experienced and talented staff in the agricultural industry. It states that AOSHPI has experts in research and engineering, whose findings are passed along to the dealer, who can make them available to the farmer. These representations are false because Harvestore silos are neither oxygen free nor oxygen limiting. In addition, Defendants did not "pass along" to the dealers the internal research showing the design flaws (see paragraph 26). Plaintiffs reviewed this operator's manual over the years preceding the 1974 purchase and relied upon the representations referred to in purchasing the 25 x 80 Harvestore silo in 1974, which caused Plaintiffs damage as a result of using the 25 x 80 silo on their farm.

(7) In the year preceding the sale of the Harvestore silo, (before 7-15-74) Plaintiffs reviewed an ad supplied to them by MVBA and its salesman, Richard Deutsch, at their home and at a Minnesota State Fair before the purchase of the silo, entitled, "How Does A.O. Smith Harvestore Prevent Spoilage?", said ad being published and made by A.O. Smith and AOSHPI. Said ad falsely states that Harvestore silos keep out air and have depictions of the Harvestore silo, showing air going into the bag, but not into the feed. Plaintiffs relied on this information, concerning the design of the Harvestore silo, purchased the silo in reliance upon such advertisement, and suffered damage as a result of using the silo on their farm.

(8) Plaintiffs received in the U.S. Mail in May, 1972, the Harvestore Farmer (Vol. 11, No. 3), which contained an

article entitled, "The Art of Haylage Making", at Page 11 thereof. Plaintiffs also saw this article after the sale. Such article was made and/or published by A. O. Smith and AOSHPI and falsely states that the breather system protects feed from oxygen and spoilage, indicates that only in conventional storage methods is there a continuous supply of fresh oxygen, thus continued destruction of the feed, and that the only bacteria that grow in Harvestore's oxygen-limited environment are anaerobic bacteria. This advertisement also stressed management skills and the making of haylage, and that immediately after filling, the Harvestore contains an inert, odorless gas-carbon dioxide. Plaintiffs relied upon this brochure in purchasing the silo, and thereby suffered damage. It reassured the Plaintiffs, when it was seen later, that they had purchased the best silo, and that they were doing everything right, and if anything did go wrong, it was due to their management of the alfalfa or management of the silo, and not due to any design problem, thus causing them to continue to use the silo and suffered damages from the use of the silo.

(9) At the Minnesota State Fair, in the early 1970's, Plaintiffs were shown an ad, "Do You Have a Nose For Good Feed?", that was made and published by A.O. Smith and AOSHPI. This advertisement stated that good feed was like molasses. Plaintiffs believed that their cows would like molasses-like feed. Plaintiffs bought the silo, in part, based upon this advertisement, and thereby suffered damages as a result of using the silo. Plaintiffs also had dark, molasses-like feed during the time the silo was in operation, and believed that this was normal for Harvestore feed, but later learned that dark, molasses-like feed was evidence of heat damage. This ad, therefore, also caused Plaintiffs to misjudge the quality of the feed from the Harvestore silo, and they continued to use the silo and suffered continued damages.

(10) Plaintiffs received the May 25, 1974 issue of "Hoard's Dairyman" through the U.S. Mail which, at Page 679 contained an advertisement entitled, "These Harvestore Owners Started With Just One". Plaintiffs relied upon this ad in purchasing the silo, and suffered damages as a result of using the silo. Said advertisement has a mail-in coupon for a brochure entitled, You Can't Beat the System", which brochure falsely states that A.O. Smith Corporation, a multi-million dollar steel fabricating corporation, tackled the problem of oxidation in feed and won (Page 6). Said brochure also states that Harvestores have a set of lungs so it can breathe, relieving pressure without allowing oxygen to spoil the feed, stating that air never touches the feed because it's trapped in the breather bags (Page 7). Plaintiffs also saw the advertisement, "These Harvestore Owners Started With Just One", in November of 1974, in another farm magazine, which Plaintiffs cannot presently recall.

(b) Films produced by AOSHPI and AOS touting the quality and character of the Harvestore structure, believed to be the Magic of the Harvestore Storage, and the Harvestore System, or films substantially similar thereto. These films were seen in Plaintiffs kitchen on several occasions in the year leading up to the sale (7-15-74). Richard Deutsch, salesman for MVBA, showed these to Plaintiffs. The films contain the following material misrepresentations:

(1) HARVESTORE SYSTEM

States that Harvestore solved the breathing problem in silos by using a breather bag system for air that's contained in the bags and doesn't contact the feed. It states A.O. Smith engineers solved the problem of structure breathing by using a balloon-like bag that keeps the air from contacting the stored feed. There is a depiction of the Harvestore silo with no

breather valve. It states the Harvestore silo takes the time element out of storage. It states the time element is removed from feed management. It states there is a difference between a Harvestore silo and a conventional silo, which is the difference between a Model-T and a jet plane. It states that concern over spoilage is eliminated. It states that Harvestore silo owners have the assurance of dependability of A.O. Smith Corporation in Milwaukee, Wisconsin. It states that Harvestore markets through a world wide dealer organization. It states the dealer stands behind the farmer for as long as he owns the equipment. It states the salesman is trained in crop management, animal nutrition, farmstead planning, finance and other key areas and will put that knowledge to work for the farmer. It states that the Harvestore silo is backed by a century-old company, the A.O. Smith Corporation. Plaintiffs believed and relied upon such statements and purchased the silo in reliance thereon and suffered damages as a result of using the silo on their farm. Plaintiffs also saw this film, or a film substantially similar thereto, after the sale of the silo on several occasions at MVBA meetings. The film caused the Plaintiffs to continue to believe in the design of the Harvestore silo and to continue to use it to their detriment.

(2) MAGIC OF HARVESTORE STORAGE

States that the system lets air move in-and-out, yet not contact stored feed. States that the Harvestore answer to the problem of air contacting feed is the now famous breather bag system. It states the bags keep the air from touching the feed. A depiction of the Harvestore silo is given with no explanation of the breather valve. It states "The bags keep the air from touching the feed." It states the Harvestore "breather system permits air to pass in and out of the structure without contacting the feed." It states that primarily what Harvestores do is make money. It states that the Harvestore breather

system permits air to come in-and-out of the structure without contacting feed. Plaintiffs believed and relied upon such statements and purchased the silo in reliance thereon and suffered damages as a result. Plaintiffs also saw this film, or a film substantially similar thereto, after the sale of the silo on several occasions at MVBA meetings. The film caused the Plaintiffs to continue to believe in the design of the Harvestore silo and to continue to use it to their detriment.

(c) The "Harvestore Farmer Magazine," which came by U.S. mail, on the dates indicated below, from Defendants to Plaintiffs residence included the following material misrepresentations upon which Plaintiffs relied to their detriment:

(1) Volume 11, number 2, (March-April 1972) at page 12. There is an article entitled "Harvestore The Inside Story". At page 13 there is depiction of the Harvestore silo and a discussion of the breather bag system in which it is stated that the air remains trapped in the breather bags where it cannot come into contact with the feed and that the system can compensate for pressure changes within the structure without allowing oxygen to enter the stored feed. The back page of this magazine states that "A.O. Smith" the name above the Harvestore is a leader in five major industries and that for 25 years Harvestore has been a leading manufacturer of automated feeding systems. Plaintiffs believed in the design of the silo to "prevent oxygen from contacting the feed." The longevity reliability, and backing of A.O. Smith was a material fact in deciding to purchase the silo and continuing to operate the silo over the years.

(2) Volume 11, number 3 at page 11, (May, 1972) is an article entitled "The Art of Haylage Making" which falsely states that the breather system protects feed from oxygen and

spoilage, and indicates that in conventional silos there is a continuous supply of fresh oxygen, thus continued destruction of the feed and that the only bacteria that grow in Harvestore's oxygen limited environment are anaerobic bacteria. This advertisement also stresses management skills and the making of haylage and that immediately after filling the Harvestore contains an inert, odorless gas-carbon dioxide. The design was important, as noted above. "Keeping the air out" is very important. However, if anything did go wrong, Plaintiffs looked to their own management skills or a repairable defect in the silo as a source of the problem and did not question the design of the silo.

(3) Volume 11, number 6, (November-December, 1972). Harvestore Farmer 1973 Buyers Guide states at page 6 that Harvestore silos prevent oxygen from contacting the feed. It has a depiction of the Harvestore silo, showing the sun and the moon, and air going in and out of the breather bags but not depicting the breather valve. It states that the fresh air is kept inside the heavy vinyl bags, and it does not reach the stored feed. Plaintiffs relied on this for reasons stated above.

(4) Volume 12, number 6 (November-December 1973). On the back page is an advertisement which discusses the corporate backing of A.O. Smith and the false statement that for 25 years Harvestore has been a leading manufacturer of automated feeding systems. This caused the Plaintiffs to believe that the name above the Harvestore "A.O. Smith" is backing the product and had been involved in manufacturing Harvestore silos for 25 years. The reliability and longevity of the company was a material factor in Plaintiffs' decision to purchase the silo, and also continued belief in the design of the silo.

(5) Volume 13, number 1 (January-February 1974). On page 4 of the Buyer's Guide is an article entitled "How a Harvestore Works" which falsely states that Harvestore silos are oxygen limiting, causes confusion between A.O. Smith and A.O. Smith Harvestore Products, Inc. and states that the Harvestore system is designed to provide an oxygen limited environment which is intended to prevent spoilage of feed while in storage and that Harvestores prevent the entry of oxygen. It has a depiction of the sun and the moon and the breather bags without showing the pressure relief valve and it goes on to state that the breather bags contain the destructive oxygen, keeping it from contact with the feed. It states that when the temperature drops the breather bags inflate and contain air that would otherwise enter the Harvestore. On the back page of this issue of the Harvestore farmer is an advertisement entitled "The Sun never sets on the Harvestore System." This ad states, falsely, that A.O. Smith Harvestore Products, Inc. is celebrating its 25th anniversary in 1974 when, in fact, it was incorporated in 1961. This advertisement intentionally confuses the relationship between A.O. Smith and A.O. Smith Harvestore Products, Inc. Plaintiffs relied on this for reasons set out above.

The Harvestore Farmer Magazine (later named Harvestore System Farming) was published by AOSHPI, and produced by Dave Brown and Associates, Chicago, Illinois. Before publication, each issue was submitted to AOS for approval. After approval by AOS, each issue was transferred to Missouri where it was printed and mailed to farmers and dealers.

(d) The "Hoard's Dairyman" magazine was received by Plaintiffs, through the interstate U.S. Mail, from January 1969 to the present. Defendants used the U.S. Mails to deliver advertising copy to Hoard's Dairyman magazine with the expectation and knowledge that the magazine would be mailed

to Plaintiffs and other farmers similarly situated. All advertisements in this magazine were submitted to AOS for approval before being published. This magazine, received by the Plaintiffs in the U.S. Mail on the dates indicated below, included the following material misrepresentations upon which Plaintiffs relied to their detriment (in addition to the Hoard's Dairyman ads set out in Paragraph 10(a):

(1) Page 67 of the January 10, 1972 issue has an advertisement entitled "The Name Above Harvestore Is a Worldwide Leader in Five Major Industries". This advertisement falsely states that A.O. Smith Corporation stands behind every Harvestore system silo and gives the impression that AOS is the manufacturer of the equipment. Plaintiffs relied on this for reasons set out above.

(2) Page 71 of the January 10, 1973 issue had an advertisement entitled "This Is Not a Silo". This advertisement falsely states that the internal breather system compensates for internal pressure chances. It also implies that AOSHPI has been in business for over 25 years. This ad contains a coupon encouraging the farmer to mail it in to receive additional information by return mail from AOSHPI. Plaintiffs relied on the design of the breather system in purchasing the silo.

(3) Page 152 of the March 25, 1973 issues has an advertisement entitled "Push Button Feed Processing System". This ad falsely states that the breather bag system keeps pressure equalized within a structure, therefore, never touching the feed. It also contains a coupon encouraging the farmer to mail it in to receive additional information by return mail from AOSHPI.

11. During the period, July 1973 to July 15, 1974, Richard Deutsch, the salesman of MVBA, made visits and telephone calls to Plaintiffs farm on 6 to 8 occasions. He made numerous representations, orally and by providing printed materials and films produced by AOS and AOSHPI about the Harvestore structure (the latter being outlined in paragraph 10) including the following:

(a) That Harvestore structures were "oxygen limiting" and would prevent oxygen from coming into contact with the feed, would preserve feed like a fruit jar and would properly store and preserve the feed.

(b) That the breather bag in the Harvestore structure compensated for all temperature and pressure changes and, even during unloading of the silo, any air that would enter the silo would be negligible because the Harvestore structure was equipped with an unloader designed to exclude air.

(c) That the air coming in the unloader door during unloading of the Harvestore structure was a very small amount and, because it would be quickly converted to a harmless gas, it would not harm the feed.

(d) That any air coming into a Harvestore structure could only enter because of a repairable problem in the Harvestore structure or due to improper management of the silo by the farmer.

(e) That A.O. Smith and A.O. Smith Harvestore Products, Inc. were really a single company and that Plaintiffs, as part of the purchase of the Harvestore structure had the backing and dependability of a century old corporation.

(f) That because of the unique features of the Harvestore structure, it was worth the additional money Plaintiffs were paying for the silo because it would produce better feed.

(g) That good Harvestore feed was a dark molasses color and would be warm and would be more palatable for the cows.

(h) That A.O. Smith had created a dealer organization that was the partner of the farmer, who was trained by the Defendants, had complete knowledge of the product, and had access to all of the research and scientific studies known to Defendants in-house experts in the fields of engineering and animal nutrition. Plaintiffs were directed to go to the dealer (MVBA) and the salesman (Richard Deutsch); the latter being described as the "Agri-Answer Man" for any questions on the product.

[Paragraphs 12-14 deleted]

15. Both before and after the installation of the Harvestore structure and throughout the period the Harvestore structure has been present on Plaintiffs property, the Plaintiff's received through the U.S. Mail "Harvestore Farmer" magazine until July, 1980, and "Harvestore System Farming" magazine from December 1980 to Spring 1991 and Hoard's Dairyman Magazine from January 1969 to the spring of 1991 and other farm related magazines outlining the benefits of the Harvestore structure as originally represented to the Plaintiffs, including the false statement that it would prevent oxygen from contacting the feed. In particular, said ads misrepresented the facts as outlined below upon which Plaintiffs relied to their detriment in that they continued to use the silo in reliance upon the design as stated in the ads and did not question the Harvestore silo as a source of problems on

their farm at any time before March, 1991. Rather, Plaintiffs looked to their farm management or repairable defects in the silo. Also, Plaintiffs continued to believe in the dealer (MVBA) having complete knowledge of the silo design and having the ability to answer any questions about the operation and use of the silo. This was especially important to the Plaintiffs because the "Dealer Organization," including MVBA, created by the Defendants was backed by a century old company that was a world leader in many manufacturing areas, whose engineers had carefully researched and created specifications for the Harvestore silo. Plaintiffs now know the dealers were not informed of any of the secret and confidential research outlined at paragraph 26; and now realize that "A.O. Smith" is not backing the product, and that AOS now claims that it didn't have anything to do with the product at the time it was manufactured and sold to the Plaintiffs. The magazines were mailed by Defendants and/or MVBA (Harvestore Farmer and Harvestore System Farming) and by Hoards Dairyman, and received by Plaintiffs on the dates indicated below.

HARVESTORE FARMER AND
HARVESTORE SYSTEM FARMING

(a) Volume 14, number 2 (1975 Buyer's Guide Special, March, 1975) at page 6 falsely states that a Harvestore is oxygen limiting, using a breather bag system to keep air from reaching the feed to present spoilage and loss of nutritional value. It also states that a Harvestore is no cure all for problems that arise from poor management--in fact, a Harvestore might only intensify the trouble where poor management is at fault. It goes on to state that in oxygen limited environment the process of fermentation is carried out by anaerobic bacteria that survive without oxygen. This same issue refers to the Harvestore representative as the "Agri-answer Man". It states that he has all the answers and that

"backing him up is the world's largest manufacturer of feed processing and automation equipment with more than a quarter of a century of helping farmers..." It tells the reader to circle number 3 on the handy postage paid return card in that issue.

(b) Volume 15, number 3 (Buyer's Guide Issue--June 1976). At page 6 of the Buyer's Guide are misrepresentations concerning the oxygen limiting features of the Harvestore system. There is a depiction of the top of a Harvestore silo showing the breather bags and the sun and the moon, but no depiction of the pressure relief valve. This depiction is a false analogy between conventional silo systems and Harvestore silos. It claims that in conventional silos air enters the feed with every daily cycle, but that the flexible bags in a Harvestore expand and contract to balance inside pressure without allowing air to contact the feed.

(c) Volume 15, number 5 (November, 1976) at page 6 is an article entitled "Bottom Unloading: Where Efficiency Begins". This article falsely states that bottom unloading helps prevent oxygen ftom coming into contact with the stored feed. It states that livestock receives warm feed in the coldest of weather, without stating the true reason why the feed is warm, (which, in fact, is caused by the continued respiration of the feed caused by design flaws) and falsely touting this as an advantage. At page 7 there are references to A.O. Smith engineers and A.O. Smith Harvestore Products, Inc. engineers, which lead the farmer to believe that there is a single company. It also states that one of the basic challenges confronting A.O. Smith engineers when they first began designing the Harvestore system, was to develop a method of unloading that did not allow the structure to fill with oxygen. It goes on to falsely state that bottom unloading was the best possible

solution to the problem. In fact, bottom unloading is the problem because of air entrance during unloading.

(d) Volume 18, number 1 (February 1979) page 20. It states that "we" made equipment 30 years ago, and "we" made it better every year since, which intentionally confuses the distinction between AOSHPI and AOS since AOSHPI was not in existence until 1961. There is a depiction of the top of a Harvestore with the breather bags showing air going in and out of the breather bags but no depiction of the breather valve. The advertisement falsely states that in a Harvestore structure air doesn't touch the feed and that the fermentation process stops in an oxygen limiting silo after oxygen is used up after filling. This advertisement also establishes a toll free number for recipients to obtain information and solicits the use of the mails.

(e) Volume 18, number 3 (June, 1979) at pages 4 and 5 is an article regarding the development of the Harvestore by "A.O. Smith" engineering. This article discusses excessive spoilage in conventional silos due to continued access of oxygen and compares it to the solutions designed by the "A.O. Smith" engineers. It states that the Harvestore structure contains virtually no air but the engineers had to solve a problem regarding external air pressure and internal air pressure. The "solution" to the problem was a plastic bag mounted in the structure that "equalized the pressure inside and outside the units walls while preventing air from contacting the feed and causing spoilage." In the same issue at page 9 is an advertisement depicting the sun and the moon showing the breather bag system but not depicting the pressure relief valve. It also states that the air in the breather bags doesn't touch the feed, but does not state that air comes in through the unloader door and through the pressure relief valve. This ad also has a coupon for the farmer to mail in for

additional information and also has a toll free number to obtain further information about Harvestore silos. It also states that "we made good equipment 30 years ago. We made it better every year since." The back cover discusses celebration of 30 years and states that "we didn't let success go to our head." It also states "we've continually worked at improving it", and "we've developed a dealer organization dedicated to providing the best in sales, construction, and service too." Since AOSHPI was not in existence until 1961, the ad intentionally confuses the distinction between AOS and AOSHPI.

(f) Volume 18, number 4 (October, 1979). The back cover has the same advertisement in the immediately preceding subparagraph.

(g) Volume 18, number 5 (December 1979) at page 25 is an advertisement which has a diagram of the top of a Harvestore silo showing the sun and the moon and the air going in and out of the breather bags but not depicting the pressure relief valve and stating that air doesn't touch the feed and that fermentation stops before excessive amounts of feed are lost. This ad doesn't mention air coming in through the pressure relief valve or through the unloader door. The ad has a mail in coupon and advises the reader of a toll free number to obtain further information about Harvestore storage systems. The back cover has the same advertisement regarding the 30 year as mentioned in the immediately preceding subparagraph.

(h) Volume 19, number 2 (May 1980) has an advertisement at page 16. This also has a depiction of the top of the Harvestore silo but does not show the pressure relief valve. The ad falsely states, "as outside temperatures fall the head space gases inside cool and contract, causing air to enter the bags but not allowing the feed deteriorating oxygen to

come into contact with the feed." It has a coupon mailed to AOSHPI to obtain a brochure entitled "High Moisture Grains" which brochure, on the back cover has a misrepresentation concerning the oxygen limiting nature of the Harvestore silo.

(i) Volume 20, number 5 (August 1981) states on page 13 that "when grain is stored at recommended moisture levels in a properly maintained Harvestore structure, the fermentation process will quickly eliminate oxygen and prevent mold formation", without stating that once air comes back into the silo through the unloader door and/or the pressure relief valve through normal daily use, secondary fermentation will begin and mold will be formed.

(j) Volume 20, number 4 (August, 1981). There is an article on page 24 wherein it states "fermentation of the stored forage or grain quickly uses up the air trapped inside during filling allowing anaerobic fermentation to replace the aerobic process that occurs when oxygen is present", without informing the farmer that known design flaws will cause aerobic degradation throughout the normal, expected use of the silo on the farm. At page 13, it falsely states that "A.O. Smith Harvestore wrote the book on oxygen limiting storage systems, more than 30 years ago."

(k) Volume 21, number 2 (April, 1982) at page 2 has an ad entitled "Here today, here tomorrow" that has a mail-in coupon for the "Harvestore System" brochure. See Paragraph 16(g). It states the Harvestore silo has the "backing of a company known for quality since 1874." This reinforced Plaintiffs' belief in the silo and confirmed their belief in AOS, the company behind the product.

(l) Volume 21, number 3 (June, 1982) at page 19. It is falsely stated that "in a Harvestore structure, the breather

system prevents the free access of air, protecting high moisture grain and other feeds from mold and spoilage by creating an oxygen limited environment that keeps mold spores dormant". At page 10 of that same magazine is the statement that "A.O. Smith Harvestore has a backing of a company known for quality since 1874. " It also has a coupon for obtaining a mailed copy of the brochure "The Harvestore System."

(m) Volume 21, number 5 (October, 1982) page 4 has a advertisement which states that Harvestore has the backing of a company known for quality since 1874 and has a mail in coupon for the "Harvestore System" brochure. A similar add appears at pages 24, 10 and 2.

(n) Volume 22, number 1 (February, 1983) at pages 4 and 24 are ads similar to those referred to in the immediately preceding subparagraph.

(o) Volume 22, number 3 (June, 1983) at page 22 is an ad which states that "the Harvestore has the backing of a company known for quality since 1874 and has a mail in coupon for the "Harvestore System" brochure, which contains false representations (See Paragraph 16(g)).

(p) Volume 22, number 5 (October, 1983) at page 4 is an advertisement indicating that A.O. Smith Harvestore wrote the book on oxygen limiting storage systems more than 30 years ago and stating that Harvestore structures are oxygen limiting. This advertisement also has a mail in coupon for the "Harvestore System" brochure, which contains false representations (See Paragraph 16(g)).

(q) Plaintiffs received, in the mail as part of the Harvestore System Farming magazine, in August 1982,

October 1982, February 1983, April 1983, June 1983, August 1983, and October 1983, after the sale of the Harvestore silo, an advertisement entitled, "Your Harvestore Dealer, Count on Him", which was made and published by A.O. Smith and AOSHPI and referred to the dealer as being a partner to provide counseling, service, and had an inventory of any repair parts that were necessary. This caused Plaintiffs to rely on the dealer and if Plaintiffs did have any problems with the silo, were assured that the dealer would be in telephone contact with A.O. Smith, who would be able to answer any problems. Plaintiffs now know that A.O. Smith and AOSHPI kept important and material information from the dealers regarding the alleged "oxygen-limiting" design and performance of Harvestore silos. This conduct prevented Plaintiffs from learning the truth about Harvestore silos, and caused them to continue to use such silo, to their detriment.

(r) In June 1982, Plaintiffs received, in the mail, the "Harvestore System Farming" (Vol 21, #3) magazine, which on page 9, contains an advertisement entitled, "They're Built Like They'd Last Forever". This advertisement falsely states that Harvestore silos have the backing of a company that has been in business since 1874, and claims that Harvestore silos are oxygen-limiting. This advertisement caused the Plaintiffs to be very confident in their Harvestore silo and never thought to question the Harvestore silo as a source of any problems. Said advertisement also contains mail-in coupons for farmers to obtain and receive more information, relative to Harvestore silos.

(s) Volume 24, number 4, (November 1985) has an ad entitled "Here's How We're Working Today... ". This advertisement states that the independent Harvestore system dealers share the commitment to providing the best possible products and services to animal agriculture. It further states,

that "every dealer pledges to uphold our standards when your Harvestore equipment is installed ... and to provide skilled service and quality parts to keep it running for the years to come."

(t) Volume 25, number 1 (Spring 1986) has an article entitled "Responding to Change". The above article was a summary of a North American dealer personnel meeting held in Chicago, Illinois. The speakers included Jack Estes, President of AOSHPI, and James Schaap, Executive Vice-President of AOSHPI. Mr. Schaap informed the dealer personnel that Harvestore was making new marketing decisions, which would support dealer business strategies and significantly improve Harvestores financial performance. Mr. Schaap assured the dealers that Harvestore would continue the existence of the dealer organization.

(u) Volume 25, number 1 (Spring 1986) has an ad entitled "Here's How We're Working Today...". This ad is identical to the ad identified in paragraph 11(s).

(v) Volume 27, number 2 (Fall 1988) has an ad entitled "Branded Parts". This ad encourages the farmer to contact their "independent Harvestore System dealer" to obtain factory bulletins, that no one else has access to. It further states that the Harvestore dealer is ready to serve the farmer "in every way possible, with management and planning advice, sales and service." Plaintiffs believed the dealer had access to all the research in the hands of Defendants and no one else did. Plaintiffs continued to believe in the design of the silo and also believed in the dealer being able to answer any and all questions concerning operation and management of the silo.

(w) Volume 28, number 2 (Fall 1989) this ad celebrates the 40th anniversary of AOSHPI, which confuses any

distinction between AOS and AOSHPI, since AOSHPI was not incorporated until 1961. It states the dealer is ready to serve the farmer in every way possible with management and planning advice, sales, and service. Plaintiffs continued to believe "A.O. Smith" was a single company and Harvestore was a product line. Plaintiffs continued to believe the dealer (MVBA) was a single source for all information on Harvestore silos. Plaintiffs never doubted the design of the Harvestore silo as a result.

HOARD'S DAIRYMAN

(x) Page 393 of the March 25, 1976 issue has an advertisement entitled "Alfalfa and Harvestore... Great Together". This ad falsely states the breather bag system inside the structure allows for the expansion and contraction of gases without admitting excess oxygen. It falsely states that stored feed remains moist and palatable and that spoilage due to oxidation is kept to a minimum. It also states that the feed value of stored forage preserves its value for months. This ad also contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(y) The issue of July 10, 1978 on the back cover has an advertisement entitled "If You're Not Looking Forward to Another Winter of Chopping Frozen Silage...You're Ready". It fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(z) In 1981-82, Plaintiffs received another advertisement in the mail, in a farm magazine, entitled, How to Produce More Milk From Your Acres", (In Hoards Dairyman magazine, May 10, 1982, page 703; March 10, 1982, page

391.) and/or "How to Produce more Milk at Less Cost" (the latter being set out at Vol. 21, #5, page 2 of the "Harvestore System Farming," and also in Hoards Dairyman, August 10, 1982, page 974; August 25, 1982, page 1079.) said ads being made and published by A.O. Smith and AOSHPI. These state that Harvestore silos are oxygen-limiting and have the backing of a company in business since 1874. Plaintiffs were caused by these advertisements to be confident in their Harvestore silo, and never thought to question such silo as a source for any problems on their farm. Said advertisement also contains a coupon to mail in to A.O. Smith Harvestore Products to obtain information in the form of a further brochure entitled, "The Harvestore System", referred to hereafter. (See paragraph 16(g).)

(aa) Plaintiffs received in the mail, Hoards Dairyman magazine July 25, 1984, page 850 and March 25, 1984, page 407, a further advertisement entitled, "It Wasn't a Question of Cost", made and published by A.O. Smith and AOSHPI, which indicated that everyone was making money with Harvestore silos. This caused Plaintiffs to believe that they had made the right choice and that they were making money with their Harvestore silo. Plaintiffs could not conceive that the Harvestore silo could be the source of any problems or damage on their farm.

(bb) On page 626 of the August 25, 1989 issue there is an ad entitled "The Inside Story". This ad states that the breather bag system reduces spoilage by limiting oxygen contact thereby implying that feed stored in a Harvestore is superior to feed stored in other types of storage systems. Fails to warn potential customers of inherent risks of using Harvestore silos. (See paragraph 26.) There is a discussion of the "Dealer Network" which states that the dealer is "ready in every way possible with information and service." This is a lie because

no dealers, including MVBA, have knowledge of the internal research and memoranda of Defendants outlined in paragraph 26. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(cc) On page 772 of the October 25, 1989 issue there is an ad entitled "The Inside Story". This ad is identical to the ad identified in paragraph 15(bb) above except it has a coupon relating to additional information regarding a Seminar in the Sun on February 25-28, 1990 in Las Vegas.

16. That after the purchase of the Harvestore silo, Plaintiffs attended fairs, shows, and meetings at MVBA at which literature and films, (including those set out at Paragraph 10b) produced by Defendants were distributed and were shown, and also received information through the U.S. Mail which included the following:

(a) At the time of construction of Plaintiffs' silo in the Spring of 1975, at Plaintiffs' farm, Plaintiffs were presented with a Harvestore structure operator's manual that was in written form and published and/or prepared by AOSHPI and A.O. Smith. Such manual states, on Page 7, that a Harvestore prevents oxygen from coming into contact with the feed. On Page 8 thereof, and also on Page 26, are false representations which indicate that AOSHPI is a division of A.O. Smith. It states that the dealers job "just begins" when the silo is constructed, and that Plaintiffs have continued access to expert counseling from the dealer. Plaintiffs relied on this manual for continued use and operation of the Harvestore silo, continued to believe that Harvestore silos prevented oxygen from coming into contact with the feed, and continued to believe that A.O. Smith was a single company, and was backing the product.

(b) Sometime after 19[illegible], Plaintiffs received, through the U.S. Mail from either MVBA or AOSHPI a brochure entitled, "Here's Why the Harvestore System Provides the Best Feed Management Technology". This brochure was written and was made and published by AOSHPI and A.O. Smith. This brochure contains false representations that Harvestore silos are oxygen limiting (Page 3), that the breather system keeps air out (Page 6), that the Harvestore protects the feed from oxygen throughout the normal temperature ranges in North America (Page 7), creates confusion concerning A.O. Smith and AOSHPI (Pages 8, 11, 16), that Harvestores have a "bottom sealer system", with "doors designed to keep air out", and that sealant is used to prevent leaks (Pages 13, 16, 20). This brochure caused Plaintiffs to believe in the oxygen limiting system of Harvestore so that they never questioned the design of the silo, and continued to use the silo to their detriment. They also believed that the Harvestore was backed by a reliable, century-old company, and as a result of these misrepresentations, never believed that any problems on their farm could be due to the Harvestore silo.

(c) After 1978, Plaintiffs received by U.S. Mail, and at either the Minnesota State Fair or from MVBA, a brochure entitled "Harvestore System Haylage", made and published by A.O. Smith and AOSHPI, which ad falsely states, at Page 2, that the Harvestore silos are oxygen-limiting, and at Page 4, that Harvestore feed is protected from storage losses. Plaintiffs were damaged in that they relied upon said ad and believed that Harvestore haylage could not cause a problem on their farm, caused the Plaintiffs to look elsewhere for a source of any problems on their farm, and caused them to continue to use the Harvestore silo to their detriment.

(d) After 1976, Plaintiffs received in the U.S. Mail, at their home, a brochure entitled, "Research Report on Grain, a

Complete Short Course in Print", which was made and published by A.O. Smith and AOSHPI. Such brochure falsely states, at Page 24, that any oxygen in the silo is quickly used up by fermentation and that no oxygen thereafter will harm the feed. It also falsely states that unloader doors are designed to exclude air. As a result of reviewing this advertisement, Plaintiffs believed the Harvestore was the best silo on the market, and did not question the design of the Harvestore silo, but rather questioned their own management of their farm and, to the extent there were any problems with feed from the Harvestore, to look for repairable defects in the silo.

(e) In 1983, in the U.S. Mail, Plaintiffs received, "A Product Guide for 1983", made and published by A.O. Smith and AOSHPI. Plaintiffs believe this came in the mail along with one or more of the "Harvestore System Farming" magazines that were mailed in 1983. Said brochure falsely states that Harvestore silos are oxygen limiting, protected from the free access of air by a breather system that prevents spoilage, and that the breather bags expand and contract so that outside air doesn't have to enter (Page 4). On Page 5, there is a photograph of the breather system, which has no reference to the relief valve. On the last two pages of said brochure, it falsely states that the Harvestore dealer is a "partner", Plaintiffs could rely on the dealer for any parts, service, or answering any questions relative to the Harvestore silo. This is false in that the Harvestore dealers had no knowledge of internal studies of A. O. Smith and AOSHPI, which revealed design flaws in Harvestore silos. This brochure continued to convince Plaintiffs that no air could enter the Harvestore silo, except through the breather bags, and very little could come in through the unloader door that was designed to exclude air. Plaintiffs thus continued to use the silo to their detriment.

(f) After 1974, Plaintiffs received from AOSHPI, in the U.S. Mail, a brochure entitled "Haylage, a Complete Short Course in Print", which was made and published by A.O. Smith and AOSHPI. Said ad falsely states, at Page 11, that if there was no oxygen, there would be no mold in oxygen-limited systems. At Page 23-24, there is reference to A.O. Smith engineers wanting to build an "air tight silo", and a claim that in oxygen-limited storage, a breather bag system eliminates the slow penetration of air into the silage pack, and that Harvestore, silos are worth the increased price one must pay because of the oxygen-limiting features. This ad caused Plaintiffs to believe in the Harvestore silo, and the Plaintiffs did not question the silo and reaffirmed their faith in the Harvestore System. Plaintiffs continued to use the Harvestore silo to their detriment.

(g) Plaintiffs received a brochure in the U.S. Mail, on several occasions after 1978 and also at fairs and at MVBA meetings, a brochure entitled, "The Harvestore System", made and published by A.O. Smith and AOSHPI. Said ad falsely states, at Page 5, that Harvestore silos are oxygen-limiting and prevent oxygen from contacting the feed. Pictures of the breather bag system do not show the pressure relief valve, and suggests air does not get into the unloader door because of "marine type hatches". Said ad further suggests, on Page 6, that "A.O. Smith" engineers are backing the product because it was their specifications that were used in connection with designing the product. It states that the Harvestore Systems dealer "stands behind every structure with a wide range of important services" such as feedlot planning, cropping programs, ration formulation, farm management and "many opportunities for you to expand your Harvestore system farming skills, through educational meetings, seminars, tours, films and printed materials". Plaintiffs were convinced that they had purchased the best possible design of a silo that was

then available and that they had the backing, of a single company that had been in business for many years that had carefully researched the product and had rigid specifications for quality control. Plaintiffs believed that all of the Defendants' knowledge was available from the dealer, MVBA.

(h) In 1979, Defendants, through numerous letters and communications by U.S. Mail, instituted a "resealer" program, ostensibly designed to seal up holes in between the steel sheets, but, in fact, intended to cause farmers to continue to believe in the design of the silo and thus dissuade them from pursuing claims based upon product design, and causing Plaintiffs and other farmers similarly situated to look elsewhere for a source of problems on their farm. Plaintiffs 25 x 80 silo was resealed under this program on June 2, 1982. Defendants mailed information about the resealer program to MVBA (See D.M. 138 (Rev 1-18)). MVBA and Defendants corresponded in the U.S. Mail about resealing Plaintiffs 25 x 80 silo on June 28, 1982. (D 1818 AOSHPI #84568). AOS Product Service Division approved the resealer warranty claim on July 20, 1982, and notified MVBA by U.S. Mail.

(i) BIRTH OF A HARVESTORE-FILM

This is a film seen on several occasions after the sale of the silo at MVBA. Makes a reference to the Corporation's vast Milwaukee facility. States that the breather bag concept allows controlled fermentation, and bottom unloading concept allows controlled fermentation. States the famous Harvestore breather bag system allows the structure to breathe while preventing harmful oxygen from contacting the feed. There is a depiction of the Harvestore silo with no breather valve. It states that the purchase of a Harvestore silo "is only the first link in an ongoing bond" between the farmer and the dealer. It says the salesman will meet with the farmer after the sale to

provide the latest scientific information. The film caused the Plaintiffs to continue to believe in the design of the Harvestore silo, caused them to believe that MVBA was a source for scientific information on the Harvestore silo, and thereby caused the Plaintiffs to continue to use it to their detriment.

[Paragraphs 17-25 deleted]

26. At all times relevant to this matter AOSHPI and AOS separately and in concert knew that problems being experienced by Plaintiffs as well as other farmers similarly situated were related to the failure of the Harvestore structure to function as represented including, but not limited to the following:

(a) That the Harvestore structure had serious and irreparable design flaws relating to air coming in through the pressure relief valve and the unloader door. This knowledge is reflected in the following documents in the possession of Defendants: Burnside to Deringer 10-25-54; NPD 7006 (12-6-66); MR 7535 (614-68); NPD 7041 (11-20-72); NPD 1108 (2-7-67); NPD 7020 (1-30-69); Patent 3,332,336; patent 3,510,319; patent 2,643,602; NPD, 7038 (2-1-72); NPD 7045 (1-15-74); MR 7534 (6-7-68); NPD 7018 (10-22-68); MR 7541 (11-27-68); NPD, 7013 (3-14-68); NPD 7007 (12-15-66); MTD 7093 (12-23-80); NPD, 7009 (3-2067); MR 7539 (10-31-68); NPD, 7030 (2-17-71); NPD, 7032 (9-7-71); MR 7549 (10-24-69); MR 7536 (6-25-68); NPD 1132; McMurray to Broberg 9-28-66; McGinn to named individuals (11-27-67); McGinn to Hyde (11-30-67); Unloader Air Intake Control Work Order (2-15-68); W.W. Smith to Warren (1-15-82); Jensen to Evers (8-11-69); Toeppneer to Slater (8-1-69); Dome Oxygen Meeting (1-25-82), H. Johnson to Lundgren (3-31-67).

(b) That the oxygen content in the dome space in the Harvestore structure reached that of ambient air within minutes of opening the unloader door with the unloader operating. This knowledge is reflected in the following documents in the possession of Defendants: NPD 7006 (12-6-66); NPD 7001 (1-25-64); NPD 7032 (9-7-71); MR 7549 (10-24-69).

(c) That AOS and AOSHPI had been warned repeatedly throughout the years by their own engineers and also by Harvestore dealers in the 1960's that design flaws existed in the silos and that the product was being falsely advertised to the farmer. This knowledge is reflected in the following documents in the possession of Defendants: R.C. Smith to J.J. Stahl (4-25-68); H. Johnson to J.J. Stahl (423-68); Burnside to Deringer 10-25-54; J.J. Stahl to H. Johnson (5-1-68); McMurray to Broberg (9-28-66); McGinn to named individuals (11-27-67); McGinn to Hyde (11-30-67); D.J. Johnson to Warren (1-29-82); Vetter to Vickerman (8-11-78); Vickerman to Warren (11-9-78); Dome Oxygen Meeting (11-25-82); Smith to Warren (1-15-82); Johnson to Smith - Tuxen Progress Report 55 (12-22-81); MR 7536 (6-25-68); NPD, 7032; NPD, 1132 (10-28-69); MTD 7093 (12-23-80); MR 7537 (9-24-68); NPD, 7018 (10-22-68); MR 7556 (12-16-70); MR 7534 (6-7-68); NPD 7007 (12-15-66); NPD, 7013 (3-14-68); MR 7082 (8-15-79); H. Johnson to Lundgren (3-31-67); William Johnson testimony (Kronebusch v. AOS). Mr. William Johnson was a Harvestore dealer in California. He went to the annual Harvestore dealers meeting in the Fall of 1964, (which, like all annual dealer's meetings, was scheduled and organized by Defendants) in Miami, Florida, and personally warned the CEO of AOSHPI, Arthur Hyde, of defects in the Harvestore silo and potential litigation. Getting no satisfaction from AOSHPI, Mr. Johnson then approached the president and counsel for AOS, L.B. Smith and John

Lundgren, in the Spring of 1965 at AOS Corporate Offices in Milwaukee, Wisconsin, and also personally warned them. Defendants subsequently removed silos from California and stopped sales in that State, but kept selling in other states, including Minnesota.

(d) That the pressure relief valve in a 25 x 80 Harvestore structure operates almost daily and allows outside air to enter the headspace of the structure and to come into direct contact with the feed. This knowledge is reflected in the following documents in possession of Defendants: NPD 7006 (12-6-66); NPD 7041 (11-20-72); NPD 7001 (11-25-64); NPD 7007 (12-15-66); NPD 7009 (3-2067).

(e) That when the Harvestore structure is in a negative pressure situation, and the farmer opens the unloader door, the breather bags have a tendency to collapse, thereby drawing in the volume of the breather bags into the unloader. This knowledge is reflected in the following documents in the possession of Defendants: Invention Disclosure Sheet D.L. Landphair (5-26-70); McMurray to Broberg (9-28-66); NPD 7007 (12-15-66); MR 7503 (3-2-65); MR 7505 (9-8-65); MR 7517 (7-24-66); Patent 3,332,336; patent 3,510,319.

(f) That medium moisture forages, such as that placed in a Harvestore structure, were more susceptible to penetration by ambient air, higher temperature and encountered more dry matter loss in the field than higher moisture forages placed in a stave silo and are, thus, more susceptible to heat damage, mold and microbial development, and resulting feed spoilage, loss of nutrient value, and reduced animal performance. This knowledge is reflected in the following documents in the possession of Defendants: NPD 7042 (1-9-73); MR 7535 (6-1468); NPD 7024 (1-22-70); MR 7562 (11-10-71); NPD 7044 (5-14-73); NPD, 7030 (2-17-71); Raymond to Reedal (2-24-

59); Vetter to Vickerman (8-11-78); Dome Oxygen Meeting (1-25-82); Warren to Landphair (4-23-75); MTD 7093 (12-2380); NPD 7007 (12-15-66); MR 7501 (2-23-65); MR 7531 (4-17-68); Winning System (pages 7, 11, 47).

(g) That a dome is created beneath the feed in a Harvestore structure, which dome is of a variable size and makes it impossible to feed from the face of the feed mass in a uniform fashion so as to keep ahead of oxidation of the feed. This knowledge is reflected in the following documents in the possession of Defendants: NPD 7007 (12-15-66).

(h) That oxygen has access to a Harvestore structure in the headspace and in the dome area and that this occurs in ever increasing amounts, depending upon level of fill, temperature, pressure and other variables not within the control of the farmer. This knowledge is reflected in the following documents in the possession of Defendants: NPD 1132 (10-28-69); EL 1102 (4-25-62); NPD 0005 (11-1-65); NPD 0001 (12-21-64); NPD 7020 (1-30-69); NPD 7009 (3-20-67); NPD 7013 (3-14-68); NPD, 7006 (12-6-66); NPD 7007 (12-15-66); MTD 7093 (12-23-80); Heffington Memo (1-6-75); H. Johnson to Lundgren (3-31-67); Patent number 2,643,602.

(i) That on January 3, 1968, the general counsel of AOS (who at the same time was general counsel and on the Board of Directors of AOSHPI) sent a directive to both AOS and AOSHPI setting forth a scheme to conceal known defects in Harvestores. The object of this scheme was to direct ordinary engineering and other memos, reports, advertising, documents to the law department at AOS so that such documents could falsely obtain the mantle of attorney/client privilege when, in fact, they were not entitled to such privilege. Such directive also constitutes an admission of Defendants AOS and

AOSHPI that there were problems with the Harvestore silo that were "far from solution."

(j) That the Harvestore structure caused a rise in temperature of the feed mass, increasing the risks of heat damage, molding, microbial development and other degradation of the feed and loss of nutrients. This knowledge is reflected in the following documents in the possession of Defendants: NPD 7026 (10-3076); NPD 7041 (11-20-72); NPD 7037 (12-30-71); NPD 7038 (2-1-72); NPD 7045 (1-15-74); MR 7531 (4-17-68); MR 7537 (9-24-68); Vickerman to Warren (11-9-68); D. G. Johnson to Warren (1-29-82); Dome Oxygen Meeting (1-25-82); Warren to Landphair (4-23-75); Johnson to Smith - Tuxen Progress Report 55 (12-22-8 1); NPD 7033 (11-30-71); NPD 7027 (12-7-70); NPD 7042 (1-9-73); MR 7535 (6-14-68); NPD 7024 (1-22-70); NPD 7047 (2-28-74); MTD 7093 (12-23-80).

The above referenced material design flaws were and continue to be fraudulently concealed by AOS and AOSHPI, not only from the Plaintiffs and other farmers throughout the country, independently and through the use of and in association with MVBA, but also from the Dealer Organization, MVBA and other dealers and salesmen of Harvestore structures. The active concealment from the dealer organization, including MVBA, of these material omissions permitted the Defendants to perpetrate the fraud on a very large scale. The dealer salesmen were required to attend organized training sessions, given by AOSHPI, on how to sell Harvestore silos, the design of the silos, and how to deal with customer objections, but were never informed of the internal research conducted by these Defendants. The farmers were repeatedly falsely advised in the ads (see Paragraphs 10, 11, 15, 16 and 63), that the dealer was a source for answers to all questions and problems concerning Harvestore silos.

MVBA and the "Dealer Organization" thereby unknowingly continued to perpetrate the fraud, while, at the same time, acting as a buffer and shield between the Plaintiffs, and other farmers, on the one hand, and the Defendants, on the other hand.

[Paragraphs 27-96 deleted]

WHEREFORE, Plaintiffs request this Court to enter a judgment in their favor and against Defendants for an amount not less than $50,000.00 and in a sum three times the actual damages proved at trial, attorney fees, costs and disbursements, and reasonable expenses for investigation, interest and that the court (a) enjoin all unlawful practices, (b) and enjoin the sale of Harvestore silos, and (c) require that the Defendants publish to Harvestore farmers information concerning known product defects.

Dated this 26th day of November, 1993.

BIRD AND JACOBSEN